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CONTINUED WORK ON THE ELABORATION OF A MODEL LAW OR LAWS ON RESTRICTIVE BUSINESS PRACTICES

Draft commentaries to possible elements for articles of a model law or laws

Prepared by the UNCTAD secretariat

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INTRODUCTION

(i) At its twelfth session, the Intergovernmental Group of Experts on Restrictive Business Practices considered proposed amendments to the revised draft of possible elements for articles of a model law or laws and commentaries to the elements, as contained in TD/B/RBP/81/Rev.2 prepared by the UNCTAD secretariat.

(ii) In its agreed conclusions, 1/ the Group of Experts decided that the secretariat should continue the elaboration of the model law or laws in TD/B/RBP/81/Rev.2, taking into account the comments received from member States before 31 January 1994. To this end, member States were invited to make, as far as possible, concrete drafting proposals for additions related to the treatment of specific issues under their own national competition legislation.

(iii) Accordingly, the present document reproduces the draft possible elements for articles unchanged, as contained in Part I of TD/B/RBP/81/Rev.2, including concrete drafting proposals and, to the extent possible commentaries submitted by Governments. It also takes into account recent trends in competition legislation adopted worldwide.

(iv) As agreed at the twelfth session, States members will be invited to continue making comments during the thirteenth session of the Group of Experts on Restrictive Business Practices on the revised text in order to make improvements to the draft model law in its present form.

PART I

A. DRAFT POSSIBLE ELEMENTS FOR ARTICLES

TITLE OF THE LAW:

Elimination or control of restrictive business practices

Antimonopoly Law

Competition Act

POSSIBLE ELEMENTS FOR ARTICLE 1

OBJECTIVES OR PURPOSE OF THE LAW

To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

POSSIBLE ELEMENTS FOR ARTICLE 2

DEFINITIONS AND SCOPE OF APPLICATION

I. Definitions

(a) "Enterprises" means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

(b) "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

(c) "Relevant market" refers to the line of commerce in which competition has been restrained and to the geographic area involved, defined to include all reasonably substitutable produces or services, and all nearby competitors, to which consumers could turn in the near term if the restraint or abuse raised prices by a not insignificant amount.

II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

POSSIBLE ELEMENTS FOR ARTICLE 3

RESTRICTIVE AGREEMENTS OR ARRANGEMENTS

I. Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal:

(a) Agreements fixing prices or other terms of sale, including in international trade;

(b) Collusive tendering;

(c) Market or customer allocation;

(d) Restraints on production or sale, including by quota;

(e) Concerted refusals to purchase;

(f) Concerted refusal to supply;

(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

II. Authorization

Practices falling within paragraph I, when properly notified in advance, and when made by firms subject to effective competition, may be authorized when competition officials conclude that the agreement as a whole will produce net public benefit.

POSSIBLE ELEMENTS FOR ARTICLE 4

ACTS OR BEHAVIOUR CONSTITUTING AN ABUSE, OR ACQUISITION AND ABUSE, OF A DOMINANT POSITION OF MARKET POWER

I. Prohibition of acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power

A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:

(i) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;

(ii) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

II. Acts or behaviour considered as abusive:

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

(c) Fixing the prices at which goods sold can be resold, including those imported and exported;

(d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

(f) Mergers, takeovers, joint ventures or other acquisitions of control, including inter-locking directorships, whether of a horizontal, vertical, or a conglomerate nature, when:

(i) At least one of the enterprises is established within the country; and

(ii) The resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

III. Authorization

Acts, practices or transactions not absolutely prohibited by the law may be authorized if they are notified, as described in article 6, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

POSSIBLE ELEMENTS FOR ARTICLE 5

SOME POSSIBLE ASPECTS OF CONSUMER PROTECTION

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

POSSIBLE ELEMENTS FOR ARTICLE 6

NOTIFICATION

I. Notification by enterprises

1. When practices fall within the scope of Articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required to notify the practices to the Administering Authority, providing full details as requested.

2. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

4. Notification could be made to the Administering Authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties, or has been terminated (otherwise than by affluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within ( ) days/months of the event) (immediately).

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of Articles 3 and 4, and existing on the date of the coming into force of the law, with the proviso that they be notified within (days/months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

II. Action by the Administering Authority

1. Decision by the Administering Authority (within ( ) days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfilment of conditions and obligations.

2. Periodical review procedure for authorizations granted every ( ) months/years, with the possibility of extension, suspension, or the subjecting of an extension to the fulfilment of conditions and obligations.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:

(a) The circumstances justifying the granting of the authorization have ceased to exist;

(b) The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;

(c) Information provided in seeking the authorization was false or misleading.

POSSIBLE ELEMENTS FOR ARTICLE 7

THE ADMINISTERING AUTHORITY AND ITS ORGANIZATION

1. The establishment of the Administering Authority and its title.

2. Composition of the Authority, including its chairmanship and number of members, and the manner in which they are appointed, including the authority responsible for their appointment.

3. Qualifications of persons appointed.

4. The tenure of office of the chairman and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.

5. Removal of members of the Authority.

6. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

7. The appointment of necessary staff.

POSSIBLE ELEMENTS FOR ARTICLE 8

FUNCTIONS AND POWERS OF THE ADMINISTERING AUTHORITY

I. The functions and powers of the Administering Authority could include (illustrative):

(a) Making inquiries and investigations, including as a result of receipt of complaints;

(b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;

(c) Undertaking studies, publishing reports and providing information to the public;

(d) Issuing forms and maintaining a register, or registers, for notifications;

(e) Making and issuing regulations;

(f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;

(g) Promoting exchange of information with other States.

II. Confidentiality:

1. According information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.

2. Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.

3. Protecting the deliberations of government in regard to current or still uncompleted matters.

POSSIBLE ELEMENTS FOR ARTICLE 9

SANCTIONS AND RELIEF

I. The imposition of sanctions, as appropriate, for:

(i) Violations of the law;

(ii) Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;

(iii) Failure to supply information or documents required within the time-limits specified;

(iv) Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense;

II. Sanctions could include:

(i) Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);

(iii) Interim orders or injunctions;

(iv) Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;

(v) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

(vi) Restitution to injured consumers;

(vii) Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

POSSIBLE ELEMENTS FOR ARTICLE 10

APPEALS

1. Request for review by the Administering Authority of its decisions in light of changed circumstances.

2. Affording the possibility for any enterprise or individual to appeal within ( ) days to the (appropriate judicial authority) against the whole or any part of the decision of the Administering Authority, (or) on any substantive point of law.

POSSIBLE ELEMENTS FOR ARTICLE 11

ACTIONS FOR DAMAGES

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

PART II

COMMENTARY TO ARTICLES

I.

1. On the basis of the agreed conclusions of the twelfth session of the Intergovernmental Group of Experts on Restrictive Business Practices, the UNCTAD secretariat has prepared revised commentaries to the draft possible elements for articles as contained in Part I, taking into account the written information and comments submitted by States, recent international legislative developments, and comments made by the Intergovernmental Group of Experts at its twelfth session.

COMMENTARY TO THE TITLE OF THE LAW

TITLE OF THE LAW

2. The draft possible elements for articles consider three alternatives for the title of the law, namely: "Elimination or Control of Restrictive Business Practices", 2/ "Antimonopoly Law" 3/ and "Competition Act". 4/

3. There is no common rule for the title of the RBP laws. The different titles adopted generally reflect the objectives and hierarchy of the law, as well as the legal traditions of the countries concerned. Examples that can be taken into account are: Australia: Trade Practices Act; Belgium: Law on the Safeguarding of Economic Competition; Colombia: Law on Promotion of Competition and Restrictive Commercial Practices; France: Ordinance on Liberalization of Prices and Competition; Germany: Act Against Restraints of Competition; India: Monopolies and Restrictive Trade Practices (MRTP) Act; Italy: Rules for the Protection of Competition and the Market; Jamaica: Fair Competition Act; Kenya: The Restrictive Trade Practices, Monopolies and Trade Control Act; Spain: Protection of Competition Law; Pakistan: The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance; Peru: Legislative Decree Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition; Poland: Law of Counteracting Monopolistic Practices; Republic of Korea: Monopoly Regulation and Fair Trade Act; Russian Federation: Law on Competition and Restriction of Monopolistic Activity in Commodity Markets; Sri Lanka: The Fair Trading Commission Act; United Kingdom: Fair Trading, Restrictive Trade Practices, Resale Prices and Competition Acts; United States of America: Antitrust Laws (Sherman Act, Clayton Act, Federal Trade Commission Act); Venezuela: Law to Promote and Protect the Exercise of Free Competition.

COMMENTARY TO ARTICLE 1

OBJECTIVES OR PURPOSES OF THE LAW

To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

4. This article has been framed in accordance with section E, paragraph 2, of the Set of Principles and Rules, which sets out the primary principle on which States should base their restrictive business practices legislation. As in section A of the Set of Principles and Rules, States may wish to indicate other specific objectives of the law, such as the creation, encouragement and protection of competition; control of the concentration of capital and/or economic power; encouragement of innovation; protection and promotion of social welfare and in particular the interests of consumers, etc., and take into account the impact of restrictive business practices on their trade and development.

5. Approaches from various country legislation include, for example, the following objectives: in Canada: "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that the small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices"; 5/ in Denmark: "to promote competition and thus strengthen the efficiency of production and distribution of goods and services etc. through the greatest possible transparency of competitive conditions"; 6/ in Norway: "to achieve efficiently utilization of society's resources by providing the necessary conditions for effective competition"; 7/ in Peru: "to eliminate monopolistic, controlist and restrictive practices affecting free competition, and procuring development of private initiative and the benefit of consumers"; 8/ in the Russian Federation: "to prevent, limit and suppress monopolistic activity and unfair competition, and ensure conditions for the creation and efficient operation of commodity markets"; 9/ in Sweden: "to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products"; 10/ in the United States: "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions"; 11/ in Venezuela: "to promote and protect the exercise of free competition" as well as "efficiency that benefits the producers and consumers"; 12/ the Andean Pact regulation refers to "the prevention and correction of distortions originated by business behaviours that impede, limit or falsify competition". 13/

6. The text proposed above refers to "control", which is in the title of the Set of Principles and Rules, and to "restrictive agreements and abuses of dominant positions of market power", which are the practices set out in sections C and D of the Set. The phrase "limit access to markets" refers to action designed to impede or prevent entry of actual or potential competitors. The term "unduly" implies that the effects of the restrictions must be perceptible, as well as unreasonable or serious, before the prohibition becomes applicable. This concept is present in the laws of many countries, such as Australia, 14/ India, Mexico, 15/ the Republic of Korea, the Russian Federation, the United Kingdom, and the European Community. 16/

7. In other legislation, cooperation agreements between small and medium-size enterprises, where such arrangements are designed to promote the efficiency and competitiveness of such enterprises vis-à-vis large enterprises, can be authorized. This is the case in Germany and Japan. Also, in Japan enterprises falling in the small and medium-size categories are defined on the basis of paid-in capital and number of employees.

8. It would be up to States to decide the manner in which any de minimis rule should be applied. There are essentially two alternatives. On the one hand, it can be left to the Administering Authority to decide on the basis of an evaluation of agreements or arrangements notified. In such case, the formulation of standards for exemption would be the responsibility of the Administering Authority. On the other hand, where the focus of the law is on considerations of "national interest", restrictions are examined primarily in the context of whether they have or are likely to have, on balance, adverse effects on overall economic development. 17/ This concept, albeit with varying nuances and emphasis, has found expression in existing restrictive business practices legislation in both developed and developing countries. 18/

COMMENTARY TO ARTICLE 2

DEFINITIONS AND SCOPE OF APPLICATION

I. Definitions

(a) "Enterprises" means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

9. The definition of "enterprises" is based on section B (i)(3) of the Set of Principles and Rules.

(b) **"Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular goods or service or group of goods or services.**

10. The definition of "dominant position of market power" is based on section B (i) (2) of the Set of Principles and Rules. For further comments on this issue, see paragraphs 52 to 58 below.

(c) **"Relevant market" refers to the line of commerce in which competition has been restrained and to the geographic area involved, defined to include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the near term if the restraint or abuse raised prices by a not insignificant amount.**

11. The definitions in the Set have been expanded to include one of "relevant market". The approach of this definition is that developed in the United States merger guidelines, which are generally accepted by antitrust economists in most countries. 19/

12. Defining the "relevant market" is in simple terms identifying the particular product/services or class of products produced or services rendered by an enterprise(s) in a given geographic area. The United States Supreme Court has defined the relevant market as "the area of effective competition, within which the defendant operates". 20/ Isolating the area of effective competition necessitates inquiry into both the relevant product market and the geographic market affected. It is also necessary to point out that defining the relevant market outlines the competitive situation the firm faces. Despite the language defining "relevant market", the fact is that markets exist and can be defined without violation of competition laws, and restraints or abuses can, by allowing for the exercise of monopoly power, lower the prices as well as raise them, also to the ultimate detriment of consumers.

13. The product market (reference to product includes services) is the first element that must be taken into account for determining the relevant market. In practice, two closely related and complementary tests have been applied in the identification of the relevant product/service market, namely the reasonable interchangeability of use and the cross-elasticity of demand. In the application of the first criterion, two factors are generally taken into account, namely, whether or not the end use of the product and its substitutes are essentially the same, or whether the physical characteristics (or technical qualities) are similar enough to allow customers to switch easily from one to another. In the application of the cross-elasticity test, the factor of price is central. It involves inquiry into the proportionate amount of increase in the quantities demand of one commodity as a result of a proportionate increase in the price of another commodity. In a highly cross-elastic market a slight increase in the price of one product will prompt customers to switch to the other, thus indicating that the products in question compete in the same market while a low cross-elasticity would indicate the contrary, i.e. that the products have separate markets.

14. The geographic market is the second element that must be taken into account for determining the relevant market. It may be described broadly as the area in which sellers of a particular product or service operate. The relevant geographic market may be limited - for example, a small city - or it may be the whole international market. In between it is possible to consider other alternatives, such as a number of cities, a province, a State, a region consisting of a number of States. For example in the context of controlling restrictive business practices in a regional economic grouping such as the European Community, the relevant geographic market is the "Common Market or a substantial part thereof". In this connection, the Court of Justice in the "European Sugar Industry" case 21/ found that Belgium, Luxembourg, the Netherlands and the southern part of the then Federal Republic of Germany constituted "substantial parts of the Common Market" (i.e. the relevant geographic market). Furthermore, the Court found that it was necessary to take into consideration, in particular, the pattern and volume of production and consumption of the product and the economic habits and possibilities open to sellers and buyers.

15. A number of factors are involved in determining the relevant geographic market including price disadvantages arising from transportation costs, degree of inconvenience in obtaining goods or services, choices available to consumers, and the functional level at which enterprises operate.

II. Scope of application

(a) **Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.**

(b) **Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.**

(c) **Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.**

16. The scope of application takes into account section B (ii) of the Set. It has been expanded to clarify the application of the law to natural persons, but not to government officials acting for the Government. 22/ However, a natural person is not an "enterprise", unless incorporated as a "personal corporation". The model law could imply that an agreement between a company and its own managing director is an agreement between two "enterprises" and thus a conspiracy. Legal analysis nearly everywhere concludes that this should not be the case.

17. Although virtually all international restrictive business practice codes, such as competition regulations of the European Community, and the Andean Group Decision on Practices Restrictive of Competition, apply only to enterprises, most national RBP laws apply to natural persons as well as to enterprises, since deterrence and relief can be more effective at the national level if owners or executives of enterprises can be held personally

responsible for the violations they engage in or authorize, such as is the case of the United Kingdom under its Restrictive Practices Act. 23/ It is also important to mention that professional associations may also be considered as "enterprises", for the purposes of competition laws.

18. Further, this definition makes clear that any agreement or action of an enterprise (except an agreement with the State) can be scrutinized to determine whether it contains an unacceptable restriction or constitutes an abuse of a dominant position.

19. The scope of application has also been clarified to exclude the sovereign acts of local governments, to whom the power to regulate has been delegated, and to protect the acts of private persons when their conduct is compelled or supervised by Governments. It should be mentioned, however, that in section B (7) of the Set of Principles and Rules and in most countries having modern restrictive business practices legislation, the law covers State-owned enterprises in the same way as private firms. 24/

20. The reference to intellectual property is consistent with virtually all antitrust laws, which treat licences of technology as "agreements" and scrutinize them for restrictions or abuses like any other agreement, except that the legal exclusivity granted by the State to inventors may justify some restrictions that would not be acceptable in other contexts.

COMMENTARY TO ARTICLE 3

RESTRICTIVE AGREEMENTS OR ARRANGEMENTS

I. **Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral formal or informal:**

(a) Agreements fixing prices or other terms of sale, including in international trade;

(b) Collusive tendering;

(c) Market or customer allocation;

(d) Restraints on production or sales, including by quota;

(e) Concerted refusals to purchase;

(f) Concerted refusal to supply;

(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

21. The elements of this Article are based upon section D, paragraph 3, of the Set of Principles and Rules and, as in the case of that paragraph, a prohibition-in-principle approach has been generally followed. Such an approach is embodied, or appears to be evolving, in the restrictive practice laws of many countries.

22. Agreements among enterprises are basically of two types, horizontal and vertical. Horizontal agreements are those concluded between enterprises engaged in broadly the same activities, i.e. between producers or between wholesalers or between retailers dealing in similar kinds of products. Vertical agreements are those between enterprises at different stages of the manufacturing and distribution process, for example, between manufacturers of components and manufacturers of products incorporating those goods, between producers and wholesalers, or between producers, wholesalers and retailers. Particular agreements can be both horizontal and vertical, as in price-fixing agreements. Engaged in rival activities refers to competing enterprises at the horizontal level. Potentially rival activities refers to a situation where the other party or parties are capable and likely of engaging in the same kind of activity, for example, a distributor of components may also be a producer of other components.

23. Agreements among enterprises are prohibited in principle in the Set, "except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other" (section D.3). It should be noted that a number of jurisdictions have ruled that firms under common ownership or control are not rival or potentially rival firms. 25/ In the United States, while some lower courts had this rule to include companies which are majority-owned by another firm, 26/ the Supreme Court has gone no further than deciding that a parent and its wholly-owned subsidiary are incapable of conspiring for purposes of the Sherman Act. 27/

24. Agreements or arrangements, whether they are written or oral, formal or informal, would be covered by the prohibition. This includes any agreement, whether or not it was intended to be legally binding. In this context, the legislation of Pakistan defines an agreement as including "any arrangement or understanding, whether or not in writing, and whether or not it is or is intended to be legally enforceable". 28/ A similar definition is to be found in India 29/ and in South Africa. 30/ The legislation in Poland 31/ and the Russian Federation 32/ refers to "agreements in any form". The Law of Spain 33/ has a generous wording covering multiple possibilities that go beyond agreements, namely "collective decisions or recommendations, or concerted or consciously parallel practices". A similar approach is followed by Peru 34/ and Venezuela. 35/ It is also the case of the Andean Pact legislation. 36/

25. Where arrangements are in writing, there can be no legal controversy as to their existence, although there might be controversy about their meaning. However, enterprises frequently refrain from entering into written agreements, particularly where it is prohibited by law. Informal or oral agreements raise the problem of proof, since it has to be established that some form of communication or shared knowledge of business decisions has taken place among enterprises, leading to concerted action or parallelism of behaviour on their part. In consequence, proof of concerted action in such instances is based on circumstantial evidence. Parallelism of action is a strong indication of such behaviour, but might not be regarded as conclusive evidence. An additional and important way for proving the existence of an oral agreement, far superior to evidence of parallel behaviour, is by direct testimony of witnesses.

26. Establishing whether parallel behaviour is a result of independent business decisions or tacit agreement would probably necessitate an inquiry into the market structure, price differentials in relation to production costs, timing of decisions and other indications of uniformity of enterprises behaviour in a particular product market. A parallel fall in prices can be evidence of healthy competition, while parallel increases should amount to strong evidence of tacit or other agreement or arrangement sufficient to shift the evidential burden to the enterprise or enterprises involved, which ought in turn to produce some evidence to the contrary as a matter of common prudence. Another way in which competitive but parallel conduct might be distinguished from conduct that is the result of an anti-competitive agreement is to inquire whether the conduct of a particular firm would be in its own interest in the absence of an assurance that its competitors would act similarly. Nevertheless, it is also important to mention that parallel price increases, particularly during periods of general inflation are as consistent with competition as with collusion and provide no strong evidence of anti-competitive behaviour.

27. The restrictive business practices listed in (a) to (g) of article 3 are given by way of example and should not be seen as an exhaustive list of practices to be prohibited. Although the listing comprises the most common cases of restrictive practices, it can be expanded to other possibilities and become illustrative by introducing between the terms "prohibition" and "of the following agreements", the expression "among others", such as for example in the new Colombian legislation; 37/ or by adding, "other cases with an equivalent effect", as it is done at the Andean Pact regulation. 38/ By doing so, article 3 becomes a "general clause" that covers not only those agreements listed under (a) to (g) but also others not expressly mentioned which the Administrative Authority might consider restrictive as well.

28. Furthermore, in some countries, such as in India, there is a presumption that monopolistic trade practices are prejudicial to the public interest and, therefore, are prohibited, subject to the defences stipulated in the law. 39/

29. A distinctive feature of the United States legislation developed in the application of Section 1 of the Sherman Act is the "per se" approach. While the guiding principle for judging anti-competitive behaviour is the "rule of reason" (unreasonable restraint being the target of control determined on the basis of inquiry into the purpose and effects of an alleged restraint), the Supreme Court has held that "there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use". 40/ Restrictions considered "per se" violations generally include price fixing, horizontal division of markets and consumers, as well as horizonal concerted refusals to deal, and bid-rigging.

30. A special feature of Russian legislation is the absence of a "per se" approach in the ban on agreements; in other words, the anti-monopoly authorities in the Russian Federation may prohibit agreements if they determine that such agreements have or may have the result of substantially restricting competition. 41/

31. The Australian legislation prohibits most price fixing agreements, boycotts and some forms of exclusive dealing. Moreover, this is also the case of India, where, under the Monopolies and Restrictive Trade Practices Act, the term or condition of a contract for the sale of goods or any agreement which provides for minimum prices to be charged on the resale of goods are prohibited "per se". 42/

COMMENTARY ON THE ILLUSTRATIVE LIST OF PRACTICES GENERALLY PROHIBITED

(a) Agreements fixing prices or other terms of sale, including in international trade

32. The Set of Principles and Rules, in paragraph D.3 (a) calls for the prohibition of "agreements fixing prices, including as to exports and imports".

33. Price fixing is among the most common forms of restrictive business practices and, irrespective of whether it involves goods or services, is considered as per se violation in many countries. 43/ Price fixing can occur at any level in the production and distribution process. It may involve agreements as to prices of primary goods, intermediary inputs or finished products. It may also involve agreements relating to specific forms of price computation, including the granting of discounts and rebates, drawing up of price lists and variations therefrom, and exchange of price information.

34. Price fixing may be engaged in by enterprises as an isolated practice or it may be part of a larger collusive agreement among enterprises regulating most of the trading activities of members, involving for example collusive tendering, market and customer allocation agreements, sales and production quotas, etc.

35. Concerning international trade, it is worth pointing out that while price-fixing with respect to goods and services sold domestically has been subject to strict control, under restrictive business practices legislation price-fixing with respect to exports has, by and large, been permitted on the grounds that such activities do not affect the domestic market. In some countries the legislation specifically exempts export cartels on condition that they are notified and registered and that they do not adversely affect the domestic market. This is the case, for example, in the Federal Republic of Germany, the Netherlands, the United Kingdom and the United States. 44/ In most other countries, practices having effects outside of the national territory are simply beyond the scope of the law, and therefore ignored. Moreover, agreements fixing prices for exports can involve enterprises from one or more countries which are then part of an international cartel. Participation of national industries in international cartels is, in principle prohibited by the legislation of the United States.

(b) Collusive tendering 45/

36. Collusive tendering is inherently anticompetitive, since it contravenes the very purpose of inviting tenders, which is to procure goods or services on the most favourable prices and conditions. Collusive tendering may take different forms, namely: agreements to submit identical bids, agreements as

to who shall submit the lowest bid, agreements for the submission of cover bids (voluntary inflated bids), agreements not to bid against each other, agreements on common norms to calculate prices or terms on bids, agreements to "squeeze out" outside bidders, agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis. Such agreements may provide for a system of compensation to unsuccessful bidders based on a certain percentage of profits of successful bidders to divide among unsuccessful bidders at the end of a certain period.

37. Collusive tendering is illegal in most countries. Even countries that do not have specific restrictive business practices laws often have special legislation on tenders. Most countries treat collusive tendering more severely than other horizontal agreements, because of its fraudulent aspects and particularly its adverse effects on government purchases and public spending. In the People's Republic of China, the bid will be declared null and void and, according to circumstances a fine will be imposed. In Kenya, for example, collusive tendering is considered a criminal offence punishable by up to three years' imprisonment where two or more persons tender for the supply or purchase of goods or services at a price, or on terms, agreed or arranged between them, except for joint tenders disclosed to, and acceptable to, the persons inviting the tender. 46/ In Sweden, there are no special provisions concerning collusive tendering in the Competition Act. This kind of horizontal cooperation falls under the general prohibition of anticompetitive agreements or concerted practices. 47/

(c) Market or customer allocation

38. Customer and market allocation arrangements among enterprises involve the assignment to particular enterprises of particular customers or markets for the products or services in question. Such arrangements are designed in particular to strengthen or maintain particular trading patterns by competitors forgoing competition in respect of each other's customers or markets. Such arrangements can be restrictive to a particular line of products, or to a particular type of customer.

39. Customer allocation arrangements occur both in domestic and international trade; in the latter case they frequently involve international market divisions on a geographical basis, reflecting previously established supplier-buyer relationships. Enterprises engaging in such agreements virtually always agree not to compete in each other's home market. In addition, market allocation arrangements can be designed specifically for this purpose.

(d) Restraints on production or sales, including by quota

40. Market-sharing arrangements may also be devised on the basis of quantity allocations rather than on the basis of territories or customers. Such restrictions are often applied in sectors where there is surplus capacity or where the object is to raise prices. Under such schemes, enterprises frequently agree to limit supplies to a proportion of their previous sales, and in order to enforce this, a pooling arrangement is often created whereby enterprises selling in excess of their quota are required to make payments to the pool in order to compensate those selling below their quotas.

(e) Concerted refusals to purchase

(f) Concerted refusal to supply

41. Concerted refusals to purchase or to supply, or the threat thereof, are one of the most common means employed to coerce those who are not members of a group to follow a prescribed course of action. Group boycotts may be horizontal (i.e. cartel members may agree among themselves not to sell to or buy from certain customers), or vertical (involving agreements between parties at different levels of the production and distribution stages refusing to deal with a third party, normally a competitor to one of the above).

42. Boycotts are considered illegal in a number of countries, particularly when they are designed to enforce other arrangements, such as collective resale price maintenance and collective exclusive dealing arrangements. For example, boycotts or stop lists for collective enforcement of conditions as to resale price maintenance are prohibited in the United Kingdom. In India, agreements which restrict or withhold output of goods 48/ are subject to notification, as are agreements designed to enforce any other agreements. 49/ In the United States, a Court of Appeals held that London reinsurers could be tried for an illegal boycott when such reinsurers agreed not to deal with any United States insurance companies which offered insurance covering accidents not discovered and claimed on while the policies were in effect, and thus forced adoption of uniform "claims made" policies throughout the United States. 50/

43. Concerted refusals to supply, whether it be to a domestic buyer or an importer, are also a refusal to deal. Refusals to supply potential importers are usually the result of customer allocation arrangements whereby suppliers agree not to supply other than designated buyers. They can also be a result of collective vertical arrangements between buyers and sellers, including importers and exporters.

(g) Collective denial of access to an arrangement, or association, which is crucial to competition

44. Membership of professional and commercial associations is common in the production and sale of goods and services. Such associations usually have certain rules of admittance and under normal circumstances those who meet such requirements are allowed access. However, admittance rules can be drawn up in such a manner as to exclude certain potential competitors either by discriminating against them or acting as a "closed shop". 51/ Nevertheless, as ruled in the United States, valid professional concerns can justify exclusions of individuals from professional associations. 52/

45. Collective denial of access to an arrangement may also take the form of denying access to a facility that is necessary in order to compete effectively in the market. 53/ In this context, the concept of facilities "crucial to competition" has been adopted in the United States by holding that a buying group with less than 30 per cent of the market can exclude firms as it wishes. 54/

II. Authorization

Practices falling within paragraph I, when properly notified in advance, and when made by firms subject to effective competition, may be authorized when competition officials conclude that the agreement as a whole will produce net public benefit.

46. Paragraph II of proposed Article 3 deals with authorization, which is the way to vest national authorities with discretionary powers to assess national interests vis-à-vis the effects of certain practices on trade or economic development. 55/ Enterprises intending to enter into restrictive agreements or arrangements of the type falling under paragraph I would accordingly need to notify the national authority of all the relevant facts of the agreement in order to obtain authorization in accordance with the procedure described in Article 6.

47. As an example, in the European Community, Article 85 (1) of the Treaty of Rome prohibits and declares "incompatible with the common market: all arrangements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market". However the prohibition is not absolute, since Article 85 (3) declares that the provisions of paragraph (1) may be declared inapplicable if such agreements or decisions contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit", with the provision that they do not:

> "(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

48. Most laws, such as those of Germany, Italy, Japan, Lithuania, Spain, 56/ Sweden, Venezuela, to cite some examples, provide for possibilities of authorization under particular circumstances, and for a limited period of time, such as crisis cartels (referred to as depression cartels in Japan and Spain), and rationalization cartels. The Colombian legislation lists research and development agreements, compliance with standards and measures legislation, and procedures, methods and systems for the use of common facilities. 57/ The Indian MRTP Act, refers to defence and security, supply of goods and services essential to the community, and agreements entered into by the Government. 58/ Similarly, the new Lithuanian law refers, more broadly, to the steady reduction of consumer prices or the improvement of the quality of goods. 59/ In the Russian Federation, such agreements are lawful if they help to keep commodity markets fully supplied, improve the quality of goods and enhance their competitiveness. 60/ Also the Peruvian legislation provides for the authorization of certain restrictive agreements when they contribute to

improving the efficiency in production and commercialization of goods and services; to increase export capacity, but solely when they are compatible with international treaties; to improve the living standards in geographical areas subject to recession, but solely when they do not affect competition. 61/

49. Furthermore, certain sectors of the economy may be exempted from the application of the law, such as banking, and public services including transport and communications, the provision of water, gas, electricity and fuel, because those activities are regulated by other laws or regulatory agencies. In other words, specific legislation creates the exemption. Such sectoral exceptions could be covered by an exemption clause under the scope of application. In recent years, however, with the rising trend of "deregulation", many countries have amended their legislation to include previously exempted sectors in the purview of the law. In the United Kingdom, for example, even State-owned utilities are covered by competition law and regularly subject to investigation.

50. It should be noted that laws adopting the per se prohibition approach - as generally do those of the United States - do not envisage any possibility of exemption or authorization, and therefore do not have a notification system for horizontal restrictive business practices. However, while the United States law does not give the antitrust agencies the power to authorize unlawful conduct, there are numerous statutory and court-made exemptions to United States Antitrust Law. 62/

COMMENTARY TO ARTICLE 4

ACTS OR BEHAVIOUR CONSTITUTING AN ABUSE, OR ACQUISITION AND ABUSE, OF A DOMINANT POSITION OF MARKET POWER

I. Prohibition of acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power

A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:

(i) Where an enterprise, either by itself or acting together with few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services.

(ii) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

51. The elements of this article are based upon section D, paragraph 4, of the Set of Principles and Rules and, as in respect of paragraph I, a prohibition-in-principle approach has been followed when the conditions described in (i) and (ii) exist. Such a situation will require a case-by-case analysis to establish whether the acts or behaviour of an enterprise involve an abuse or acquisition and abuse of a dominant position of market power.

52. A dominant position of market power refers to the degree of actual or potential control of the market by an enterprise or enterprises. The control can be measured on the basis of market shares, total annual turnover, size of assets, number of employees, etc.; also it should focus on the ability of a firm to raise prices above (or depress prices below) the competitive level for a significant period of time. In certain countries, the law specifies the market share which the enterprise or enterprises must hold in order to be considered in a dominant position or a monopolistic situation. For example, in the United Kingdom a monopoly is presumed to exist if a company supplies or purchases 25 per cent or more of all the goods or services of a particular type in the United Kingdom or in a defined part of it - local monopolies can therefore be examined. 63/ Also it defines a complex monopoly as a situation where a group of companies that together have 25 per cent of the market all behave in some way that affects competition. 64/ In Poland, the law presumes a firm might have "a dominant position, when its market share exceeds 40 per cent". 65/ The presumption contained in the 1991 Law of the Czech Republic is of 30 per cent 66/, which also is the case of Hungary 67/ and Portugal. 68/ In the cases of Lithuania, 69/ and the Russian Federation, 70/ their laws refer to 40 and 35 per cent, respectively. In Germany, the legislation contains several presumptions, namely: at least one enterprise has one third of a certain type of goods or commercial services, and a turnover of at least DM 250 million in the last completed business year; three or less enterprises have a combined market share of 50 per cent or over; five or less enterprises have a combined market share of two thirds or over. This presumption does not apply to enterprises which recorded turnovers of less than DM 100 million in the last completed business year. 71/

53. Specific criteria defining market dominance, however, can be difficult to lay down. In addition to market share, the structural advantages possessed by enterprises can be of decisive importance. For example, the Court of Justice of the European Communities in the United Brands Judgement took into account the fact that the undertaking possessed a high degree of vertical integration, that its advertising policy hinged on a specific brand ("Chiquita"), guaranteeing it a steady supply of customers and that it controlled every stage of the distribution process, which together gave the corporation a considerable advantage over its competitors. 72/ In consequence, dominance can derive from a combination of a number of factors which, if taken separately, would not necessarily be determinative.

54. As seen in the German law above, a dominant position of market power refers not only to the position of one enterprise but also to the situation where a few enterprises acting together could wield control. This clearly refers to highly concentrated markets such as in an oligopoly, where a few enterprises control a large share of the market, thus creating and enjoying conditions through which they can dominate or operate on the market very much in the same manner as would a monopolist. In consequence, the cumulative effect of their use of a particular practice, such as tying agreements, may well result in an abuse of a dominant position.

55. The abuse or acquisition and abuse of a dominant position are two closely interrelated concepts, namely the abuse of a dominant position of market power, and the acquisition and abuse of such power.

56. Subparagraphs (a) to (f) below indicate the behaviour considered prima facie abusive when an enterprise is in a dominant position. As such, the inquiry concerns an examination of the conduct of the market-dominating enterprise(s) rather than a challenge of its dominance. However, the maintenance and exercise of such power through abusive behaviour is challenged.

57. It should be noted that in the last decade the United States case law has shifted generally towards more favourable evaluation of vertical restraints. The 1985 Antitrust Division Guidelines describing its enforcement policy in respect of vertical restraints (withdrawn since August 1993) indicated that it would not take legal proceedings against the use of vertical practices by firms with less than a 10 per cent market share, and that vertical practices by firms with larger than 10 per cent market share would not necessarily be subject to challenge but would be subject to further analysis under the rule of reason. 73/

II. **Acts or behaviour considered as abusive**:

(a) **Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;**

58. One of the most common forms of predatory behaviour is generally referred to as predatory pricing. Enterprises engage in such behaviour to drive competing enterprises out of business, with the intention of maintaining or strengthening a dominant position. The greater the diversification of the activities of the enterprise in terms of products and markets and the greater its financial resources, the greater is its ability to engage in predatory behaviour. 74/ An example of regulations on predatory pricing appears in the People's Republic of China Law for Countering Unfair Competition. It states that an operator (i.e. enterprises or individuals) may not sell its or his goods at a price that is below the cost for the purpose of excluding its or his competitors. 75/

59. Predatory pricing is not limited to pricing. Other means, such as acquisition with a view to the suspension of activities of a competitor, can be considered as predatory behaviour. 76/ So can excessive pricing, or the refusal of an enterprise in a dominant position to supply a material essential for the production activities of a customer who is in a position to engage in competitive activities. 77/

(b) **Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;**

60. Closely related to predatory pricing is the practice of discriminatory pricing. While below-cost pricing vis-à-vis direct competitors is clearly predatory, discriminatory pricing can also be predatory, as for example in the case of discounts based on quantities, "bonus systems" or "fidelity discounts". 78/ In this situation, irrespective of injury to direct

competitors, discriminatory pricing can injure competitors of the favoured purchaser. 79/ In spite of what has been mentioned, it is also important to point out that in many cases quantity discounts often reflect reduced transaction costs or have the purpose of meeting competition, and should not be discouraged. Injury to competitors of the favoured purchaser should not in and of itself concern competition authorities, because competition laws should protect competition and not competitors.

61. In India, discriminatory discounts based on quantities were found to reduce the opportunities of several wholesalers to compete with large ones, thereby reducing competition among them. 80/ In Peru, although the legislation considers discriminatory pricing as an example of abusive behaviour, it also states that do not constitute a case of abuse of dominant position those discounts and bonuses that correspond to generally accepted commercial practices, that are given because of special circumstances such as anticipated payment, quantity, volume, etc., and when they are granted in similar conditions to all consumers. 81/

62. Other types of price-based discrimination would include "delivered pricing", i.e. selling at uniform price irrespective of location (whatever the transportation costs to seller), and "base-point selling", where one area has been designated as base point (whereby the seller charges transportation fees from that point irrespective of the actual point of shipment and its costs).

63. The proscription of discrimination also includes terms and conditions in the supply or purchase of goods or services. For example, the extension of differentiated credit facilities or ancillary services in the supply of goods and services can also be discriminatory. In the Australian legislation, the prohibition of discrimination is not limited to price-based discriminations, but refers also to credits, provision of services and payment for services provided in respect of the goods. 82/ It is also to point out that differential terms and conditions should not be considered unlawful if they are related to cost differences. More generally, preventing firms from offering lower prices to some customers may well result in discouraging firms from cutting prices to anyone. 83/

64. Undercharging for goods or services in transactions between affiliated enterprises (a case of transfer pricing), can be used as a means of predation against competitors who are not able to obtain supplies at comparable prices.

(c) Fixing the prices at which goods sold can be resold, including those imported and exported;

65. Fixing the resale price of goods, usually by the manufacturer or by the wholesaler, is generally termed resale price maintenance (RPM). Resale price maintenance is prohibited in many countries, such as for example India, Italy, New Zealand, 84/ Republic of Korea, the United Kingdom, and the United States. In Sweden, resale price maintenance with an appreciable effect on competition is caught by the prohibition against anticompetitive cooperation as laid down in the Competition Act. 85/

66. While the imposition of a resale price is proscribed, legislation in some States does not ban maximum resale prices (i.e. the United Kingdom) nor

recommended prices (i.e. the United Kingdom, and the United States). In the United States, the practice of recommended resale price would be illegal if there was a finding of any direct or indirect pressure for compliance. In the United Kingdom, although recommended resale prices are not proscribed, the Director General of Fair Trading may prohibit the misleading use of recommended prices, for example where unduly high prices are recommended in order to draw attention to apparently large price cuts. 86/ In Canada, the publication by a product supplier of an advertisement that mentions a resale price for the product is considered to be an attempt to influence the selling price upwards, unless it is made clear that the product may be sold at a lower price. 87/

67. It should be noted that collective resale price maintenance would, when involving competing enterprises (i.e. wholesalers) be covered by Article 3, I (a) proposed above as a type of price-fixing arrangement.

68. Refusals to deal are generally the most commonly used form of pressure for non-compliance. For avoiding this situation, for example, the Commission of the European Communities fined a United States corporation and three of its subsidiaries in Europe for having placed an export ban, in respect of its product (pregnancy tests), on their dealers in one of the European countries (United Kingdom) where such products were sold at considerably lower prices than in another European country (Federal Republic of Germany) concerned. 88/ Canadian legislation expressly prohibits refusing to supply a product to a person or class of persons because of their low pricing policy. 89/

(d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;

69. This practice by a dominant firm is prohibited in the Set in section D.4 (e). The owner of a trademark may obtain market power through heavy advertising and other marketing practices. If the trademark in question acquires wide acceptance and wide distribution, the trademark owner can be in a position to impose a wide range of RBPs on the distributors of products having its trademark. Trademarks can be used to enforce exclusive dealing arrangements, to exclude imports, allocate markets and, at times, to charge excessive prices. Nevertheless, it should be noted that there are various valid reasons why enterprises might limit distribution of their market products, such as maintaining quality and preventing counterfeiting. These measures are designed to protect legitimate intellectual property rights as well as to consumers. 90/

70. With regard to restricting the importation of goods, the owner of a trademark may seek to prevent imports of the trademarked product; to prevent anybody other than his exclusive distributor from importing the goods

(parallel imports), to prevent similar products having his trademark from being imported in competition with his own products, and to use different trademarks for the same product in different countries, thereby preventing imports from one another.

71. In Japan, for example, Old Parr Co. instructed its agents not to supply its whisky to dealers who imported Old Parr whisky from other sources, or who sold the imported products at less than the company's standard price. It devised a special checking mark for packaging supplied by its agents in order to detect any dealer not complying with its requirements. The Japanese Fair Trade Commission investigated the case and found that such action constituted an unfair business practice and accordingly ordered Old Parr to discontinue its practice. 91/

72. Concerning restrictions on the importation of similar products legitimately bearing an identical or similar trademark, an example is the Cinzano Case in the Federal Republic of Germany. In this case the Federal Supreme Court decided that when a trademark owner has authorized its subsidiaries or independent licensees in different countries to use his mark and sell the goods to which the mark is affixed, the owner may not in such circumstances prohibit importation of products when placed on the market abroad by its foreign subsidiaries or licensees and irrespective of whether the goods differ in quality from the goods of the domestic trademark owner. 92/

73. As indicated above, a trademark registered in two or more countries can originate from the same source. In the case of trademarked products exported to other countries but not manufactured there, the trademark is frequently licensed to the exclusive distributor. For example, Watts Ltd of the United Kingdom, a producer of record maintenance goods, and its exclusive distributor and trademark licensee in the Netherlands, the Theal B.V. (later renamed Tepea B.V.), were fined by the Commission of the European Communities for using its trademark to prevent parallel imports into the Netherlands. The Commission found that the exclusive distribution agreements were designed to ensure absolute territorial protection for Theal by excluding all parallel imports of authentic products, and this protection was strengthened by the prohibition on exports imposed by Watts on wholesalers in the United Kingdom. The system, taken as a whole, left Theal completely free in the Netherlands to fix prices for imported products. 93/

74. The fourth type of case concerns the use of two different trademarks for the same product in different countries in order to achieve market fragmentation. In an action brought by Centrafarm B.V. against American Home Products Corporation (AHP), Centrafarm claimed that, as a parallel importer, it was entitled to sell without authorization in the Netherlands, under the trade name "Seresta", oxazepamum tablets originating from AHP Corporation and offered for sale in the United Kingdom under the name "Serenid D", since the drugs were identical. In this case, the Court ruled that the exercise of such a right can constitute a disguised restriction on trade in the EEC if it is established that a practice of using different marks for the same product, or preventing the use of a trademark name on repackaged goods, was adopted in order to achieve partition of markets and to maintain artificially high prices. 94/

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee

75. While prohibited in principle, possible authorization has been envisaged for behaviour listed in sub-articles (i) to (iv) when it is for ensuring the achievement of legitimate business purposes such as safety, quality adequate distribution or service provided it is not inconsistent with the objective of the law. Governments set standards in order to ensure adequate health, safety and quality. However, when enterprises claim such standards as justification for engaging in exclusionary practices, particularly when in a dominant position, it gives rise to suspicion as to the purpose of such practices, i.e. whether or not the intent is monopolistic. It is even more suspect when enterprises set standards of their own volition and claim quality considerations as justification for the use of such practices as refusals to deal, tied selling and selective distribution arrangements. Agreements on standards among competitors, if they restricted access to markets, would be subject to Article 3.

76. As a general rule, the inquiry regarding exclusionary behaviour should entail an examination of the position of the relevant enterprises in the market, the structure of the market, and the probable effects of such exclusionary practices on competition as well as on trade or economic development.

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

77. A refusal to deal may seem like an inherent right, since theoretically only the seller or the buyer is affected for his refusal to sell or buy. However, in reality the motives for refusing to sell can be manifold and are often used by dominant firms to enforce other practices such as resale price maintenance or selective distribution arrangements. In addition, refusals to sell can be intimately related to an enterprise's dominant position in the market and are often used as a means of exerting pressure on enterprises to maintain resale prices.

78. Refusals to deal that are intended to enforce potentially anti-competitive restrains, such as resale price maintenance and selective

distribution arrangements, raise obvious competitive concerns. Refusals to deal, however, are not in and of themselves anti-competitive, and firms should be free to choose to deal, and also give a preferential treatment, to traditional buyers, related enterprises, dealers that make timely payments for the goods they buy, or who will maintain the quality, image, etc. of the manufacturer's product. 95/ Also it is the case when the enterprise announces in advance the circumstances under which he will refuse to sell (i.e. merely indicating his wishes concerning a retail price and declining further dealings with all who fail to observe them). In this context the United States Supreme Court had ruled that "the purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce - in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and of course, he may announce in advance the circumstances under which he will refuse to sell". 96/

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

79. Such behaviour is frequently an aspect of "exclusive dealing arrangements", and can be described as a commercial practice whereby an enterprise receives the exclusive rights, frequently within a designated territory, to buy, sell or resell another enterprise's goods or services. As a condition for such exclusive rights, the seller frequently requires the buyer not to deal in, or manufacture, competing goods.

80. Under such arrangements, the distributor relinquishes part of his commercial freedom in exchange for protection from sales of the specific product in question by competitors. The terms of the agreement normally reflect the relative bargaining position of the parties involved.

81. The results of such restrictions are similar to that achieved through vertical integration within an economic entity, the distributive outlet being controlled by the supplier but, in the former instance, without bringing the distributor under common ownership.

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

82. Arrangements between the supplier and his distributor often involve the allocation of a specific territory (territorial allocations) or specific type of customer (customer allocations), i.e. where and with whom the distributor can deal. For example, the distributor might be restricted to sales of the product in question in bulk from the wholesalers or only to selling directly to retail outlets. The purpose of such restrictions is usually to minimize intra-brand competition by blocking parallel trade by third parties. The effects of such restrictions are manifested in prices and conditions of sale,

particularly in the absence of strong inter-brand competition in the market. Nevertheless, restrictions on intra-band competition may be benign or procompetitive if the market concerned has significant intra-band competition. 97/

83. Territorial allocations can take the form of designating a certain territory to the distributor by the supplier, the understanding being that the distributor will not sell to customers outside that territory, nor to customers which may, in turn, sell the products in another area of the country.

84. Customer allocations are related to the case in which the supplier requires the buyer only to sell to a particular class of customers, for example, only to retailers. Reasons for such a requirement are the desire of the manufacturer to maintain or promote product image or quality, or that the supplier may wish to retain for himself bulk sales to large purchasers, such as sales of vehicles to fleet users or sales to the government. Customer allocations may also be designed to restrict final sales to certain outlets, for example approved retailers meeting certain conditions. Such restrictions can be designed to withhold suppliers from discount retailers or independent retailers for the purpose of maintaining resale prices and limiting sales and service outlets.

85. Territorial and customer allocation arrangements serve to enforce exclusive dealing arrangements which enable suppliers, when in a dominant position in respect of the supply of the product in question, to insulate particular markets one from another and thereby engage in differential pricing according to the level that each market can bear. Moreover, selective distribution systems are frequently designed to prevent resale through export outside the designated territory for fear of price competition in areas where prices are set at the highest level.

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

86. Such behaviour is generally referred to as tied selling. The "tied" product may be totally unrelated to the product requested or a product in a similar line. 98/ Tying arrangements are normally imposed in order to promote the sale of slower moving products and in particular those subject to greater competition from substitute products. By virtue of the dominant position of the supplier in respect of the requested product, he is able to impose as a condition for its sale the acceptance of the other products. This can be achieved, for example, through providing fidelity rebates based upon aggregate purchases of the supplying enterprise's complete range of products. 99/

87. It should be noted that the United States amended its patent law in 1988 to provide that tying one patent to another, or to purchase of a separate product, will not constitute an illegal extension of the patent right unless "the patent owner has market power in the relevant market for the patent or patented product on which the licence or sale is conditioned". 100/ This legislative action effectively overruled previous statements by United States

courts that the holder of a patent should be presumed to have market power. The United States Congress accepted that many patented products are subject to effective competition from substitute products.

(f) Mergers, takeovers, joint ventures, or other acquisitions of control, 101/ including interlocking directorships, whether of a horizontal, vertical, or a conglomerate nature, when:

(i) At least one of the enterprises is established within the country; and

(ii) The resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

88. Concentration of economic power occurs inter alia through mergers, takeovers, joint ventures and other acquisitions of control, such as interlocking directorates. A merger is a fusion between two or more enterprises whereby the identity of one or more is lost and the result is a single enterprise. The takeover of one enterprise by another usually involves the purchase of all or a sufficient amount of the shares of another enterprise to enable it to exercise control, and it may take place without the consent of the former. A joint venture involves the formation of a separate enterprise by two or more enterprises. Such acquisitions of control might, in some cases, lead to a concentration of economic power which may be horizontal (for example, the acquisition of a competitor), vertical (for example, between enterprises at different stages of the manufacturing and distribution process), or conglomerate (involving different kinds of activities). In some cases such concentrations can be both horizontal and vertical, and the enterprises involved may originate in one or more countries.

89. Many States, in controlling mergers and other forms of acquisition of control, have established a system of notification prior to consummation of mergers such as in the United States and the EC. Notification is only mandatory when enterprises concerned have, or are likely to acquire, a certain level of concentration. The main indicators used for examining such concentration of economic power are market shares, total annual turnover, number of employees and total assets. The other factors, including the general market structure, the existing degree of market concentration, barriers to entry and the competitive position of other enterprises in the relevant market, as well as the advantages currently enjoyed and to be gained by the acquisition, are also taken into account in assessing the effects of an acquisition. It is important to note that authorization schemes must not be interpreted as to discourage firms from undertaking pro-competitive activities.

90. For example, in 1989 the European Communities adopted a comprehensive system of merger control. The regulation requires the registration of all mergers or acquisitions between firms with a combined turnover of 5 billion ECUs, each having a turnover of at least 200 million in the EC.

Such transactions have to be notified, and halted for up to 90 days if investigated. 102/ Mergers which do not reach the threshold indicated are still subject to control by national Member State authorities. 103/

91. Horizontal acquisitions are clearly the type of activity which contributes most directly to concentration of economic power and which is likely to lead to a dominant position of market power, thereby reducing or eliminating competition. 104/ This is why restrictive business practices legislation in many developed and developing countries applies strict control to the merging or integration of competitors. In fact, one of the primary purposes of anti-monopoly legislation has been to control the growth of monopoly power, which is often created as a direct result of integration of competitors into a single unit. Horizontal acquisitions of control are not limited to mergers but may also be effected through take-overs, joint ventures or interlocking directorates. Horizontal acquisition of control, even between small enterprises, while not necessarily adversely affecting competition in the market, may none the less create conditions which can trigger further concentration of economic power and oligopoly.

92. Where the acquisition of control is through the establishment of a joint venture, the first consideration should be to establish whether the agreement is of the type proscribed by Article 3, and involving market allocation arrangements or likely to lead to allocation of sales and production.

93. Vertical acquisitions of control involve enterprises at different stages in the production and distribution process, and may entail a number of adverse effects. For example, a supplying enterprise which merges or acquires a customer enterprise can extend its control over the market by foreclosing an actual or potential outlet for the products of its competitors. By acquiring a supplier, a customer can similarly limit access to supplies of its competitors.

94. Conglomerate acquisitions which neither constitute the bringing together of competitors nor have a vertical connection (i.e. forms of diversification into totally unrelated fields) are more difficult to deal with, since it could appear ostensibly that the structure of competition in relevant markets would not change. The most important element to be considered in this context is the additional financial strength which the arrangement will give to the parties concerned. A considerable increase in the financial strength of the combined enterprise could provide for a wider scope of action and leverage vis-à-vis competitors or potential competitors of both the acquired and the acquiring enterprise and especially if one or both are in a dominant position of market power. 105/

95. Cross-frontier acquisitions of control. Any merger, take-over or other acquisition of control involving a transnational corporation should be subject to close scrutiny in all countries where it operates, since such acquisitions of control, irrespective of whether they take place solely within a country or abroad, can have direct or indirect effects on the operations of other units of the economic entity.

96. For example, in Australia, amending legislation to strengthen and improve the effectiveness of the Trade Practices Act, 1986, was introduced to cover overseas mergers of foreign corporations with subsidiaries in Australia. Subsection 50 (A) (1) provides that the Tribunal may, on the application of the Minister, the Commission or any other person, make declaration that the person who, as a consequence of an acquisition outside Australia, obtains a controlling interest (defined by subsection 50 (A) (8)) in one or more corporations, would or would be likely to dominate a substantial market for goods or services in Australia, and that the acquisition will not result in a public benefit. The term "substantial market for goods and services" is used to make it clear that the provision applies only to markets of a similar magnitude to those to which section 50 applies.

97. Interesting examples of action against international mergers taking place outside the national borders, but having effects in the national territory, are provided by the Federal Cartel Office of Germany, in the Bayer/Firestone and Phillip Morris/Rothmans mergers cases. 106/

98. An interlocking directorship is a situation where a person is a member of the board of directors of two or more enterprises or the representatives of two or more enterprises meet on the board of directors of one firm. This would include interlocking directorship among parent companies, a parent of one enterprise and a subsidiary of another parent or between subsidiaries of different parents. Generally financial tie-ups and common ownership of stocks give rise to such situations.

99. Interlocking directorships can affect competition in a number of ways. They can lead to administrative control whereby decisions regarding investment and production can in effect lead to the formation of common strategies among enterprises on prices, market allocations and other concerted activities of the type discussed in Article 3. Interlocking directorates at the vertical level can result in vertical integration of activities such as, for example, between suppliers and customers, discourage expansion into competitive areas, and lead to reciprocal arrangements among them. Links between directorates of financial enterprises and non-financial enterprises can result in discriminatory conditions of financing for competitors and act as catalysts for vertical-horizontal or conglomerate acquisitions of control.

100. It is important to note that interlocking directorship can be used as a means of circumventing any well-constructed and rigorously applied legislation in the area of restrictive business practices, if it is not effectively controlled. 107/ Therefore, States may wish to consider mandatory notification of interlocking directorates and prior approval thereof, irrespective of whether the interlocking is among competitors, vertical or conglomerate.

III. Authorization

Acts, practices or transactions not absolutely prohibited by the law may be authorized if they are notified, as described in Article 6, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

101. The Set of Principles and Rules lays down that whether acts or behaviour are abusive should be examined in terms of their purpose and effects in the actual situation. In doing this, it is clearly the responsibility of enterprises to advance evidence to prove the appropriateness of their behaviour in a given circumstance and the responsibility of the national authorities to accept it or not. Generally, in respect of the practices listed under (a) to (d) it is unlikely that, when a firm is in a dominant position, their use would be regarded as appropriate given their likely effects on competition and trade or on economic development.

COMMENTARY TO ARTICLE 5

SOME POSSIBLE ASPECTS OF CONSUMER PROTECTION

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

102. In some countries, like Australia, the restrictive business practices law contains a chapter devoted to consumer protection. Undoubtedly, competition issues are closely related to protection of consumers' economic interests. This is also the case, for example, in Canada, India, Lithuania and Venezuela, where their competition laws contain regulations on "unfair trade practices". The text of UNCTAD Model Law or Laws (1984 version), in TD/B/RBP/15/Rev.1, listed some elements that could be considered by States for inclusion in their restrictive business practices legislation. However, the present trend in countries adopting such legislation seems to be the adoption of two separate laws, one on RBPs or competition, and the others on consumer protection. Nevertheless, because of the links between the two bodies of law, the administration of these laws is often the responsibility of the same authority. This is the case, for example, in Australia, Canada, Colombia, El Salvador, Finland, France, Hungary, New Zealand, Norway, Peru, Poland, Russian Federation, Sri Lanka, the United Kingdom, and the United States.

103. It is also important to take into account the United Nations General Assembly resolution on Consumer Protection 108/ in which comprehensive guidelines on this issue were adopted in 1985. This set includes, inter alia, measures devoted to the promotion and protection of consumers' economic interests, along with standards for the safety and quality of consumer goods and services; distribution facilities for essential consumer goods and services; measures enabling consumers to obtain redress; education and information programmes, etc. In this context the United Nations Guidelines on Consumer Protection refers explicitly to the Set of Principles and Rules for the Control of Restrictive Business Practices and recommends

Governments to develop, strengthen or maintain measures relating to the control of restrictive and other abusive business practices which may be harmful to consumers, including means for the enforcement of such measures. 109/

COMMENTARY TO ARTICLE 6

NOTIFICATION

I. Notification by enterprises

1. When practices fall within the scope of Articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required to notify the practices to the Administering Authority, providing full details as requested.

2. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

4. Notification could be made to the Administering Authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties, or has been terminated (otherwise than by effluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within ... days/months of the event) (immediately).

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of Articles 3 and 4, and existing on the date of the coming into force of the law, with the proviso that they be notified within (... days/months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

104. The approach adopted in the Model Law is a prohibition in principle of restrictive agreements. In consequence, when practices fall within the scope of Articles 3 and 4, and are not prohibited outright, the possibility for their authorization exists. Notification also applies for Merger Control if this is provided for under Article 4 or under a separate article of the Law. It should be noted, however, that excessive provision for notification and

registration in the law may be extremely burdensome for enterprises and for the responsible authorities. Therefore many laws requesting notification, such as in Spain, Sweden, or the European Community regulations, exempt or give "block exemptions" for specific practices, or for transactions below given thresholds. This will also be the case of Poland, under the proposed amendments to their law, presently under consideration at Parliament. In Sweden, block exemptions are similar to those in force within the European Community. In addition, in Sweden a block exemption has been issued for certain forms of cooperation in chains in the retail trade. 110/

105. In seeking authorizations, enterprises would be required to notify the full details of intended agreements or arrangements to the Administering Authority. The particulars to be notified depend on the circumstances and are unlikely to be the same in every instance. The information required could include, inter alia:

(a) The name(s) and registered address(es) of the party, or parties concerned;

(b) The names and the addresses of the directors and of the owner, or part owners;

(c) The names and addresses of the (major) shareholders, with details of their holdings;

(d) The names of any parent and interconnected enterprises;

(e) A description of the products, or services, concerned;

(f) The places of business of the enterprise(s), the nature of the business at each place, and the territory or territories covered by the activities of the enterprise(s);

(g) The date of commencement of any agreement;

(h) Its duration or, if it is terminable by notice, the period of notice required;

(i) The complete terms of the agreement, whether in writing or oral, in which oral terms would be reduced to writing.

106. In seeking authorization, it is for the enterprises in question to demonstrate that the intended agreement will not have the effects proscribed by the law, or that it is not in contradiction with the objectives of the law.

107. With regard to authorization in respect of behaviour falling under Article 4, information supplied in notifications should include, for example, the share of the market, total assets, total annual turnover and number of employees, including those of horizontally and vertically integrated or interconnected enterprises, in order to ascertain the market power of the enterprises concerned. Those enterprises falling in the category of "market

dominating enterprises" (the specific criteria of which would need to be drawn up by the Administering Authority), and those which may as a result of such arrangements and practices meet those criteria, would have to notify the details, in full, to the Administering Authority.

II. Action by the Administering Authority

1. Decision by the Administering Authority (within ... days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfilment of conditions and obligations.

2. Periodical review procedure for authorizations granted every ... months/years, with the possibility of extension, suspension, or the subjecting of an extension to the fulfilment of conditions and obligations.

108. The coming into force of agreements notified would depend on a number of factors. In the case of mergers and other acquisitions of control, the prior authorization of the Administering Authority in a given time-frame before the coming into force of agreements should be envisaged. The same procedure could also be applied with respect to agreements and arrangements notified under Articles 3 and 4 (e) to (f), but it could cause certain delays in business decisions. With regard to the latter, the agreements could perhaps come into force provisionally unless decided otherwise by the Administering Authority, within a given time-frame.

109. Section II, paragraph 2, of this Article provides for a review and suspension procedure for authorization granted. If authorizations are granted in particular economic circumstances, it is usually on the understanding that these circumstances are likely to continue. A review procedure is necessary, however, not only in cases where circumstances may have changed, but also where the possible adverse effects of the exemption were not predicted or foreseen at the time at which the authorization was given.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:

(a) The circumstances justifying the granting of the authorization have ceased to exist;

(b) The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;

(c) Information provided in seeking the authorization was false or misleading.

110. Section II, paragraph 3, provides for withdrawing an authorization when there has been a change of facts, or when a break of obligations, or an abuse of exemption has been committed. This also includes instances where the original decision was based on incorrect or deceitful information.

COMMENTARY TO ARTICLE 7

THE ADMINISTERING AUTHORITY AND ITS ORGANIZATION

1. The establishment of the Administering Authority and its title.

111. Section E.1 of the Set of Principles and Rules requires States to adopt, improve and effectively enforce appropriate legislation and to implement judicial and administrative procedures in this area. Recent enactments of legislation and legislative amendments in different countries show trends towards the creation of new bodies for the control of restrictive business practices, or changes in the existing authorities in order to confer additional powers on them and make them more efficient in their functioning.

112. In some cases, there has been a merging of different bodies into one empowered with all functions in the area of restrictive business practices, consumer protection or corporate law. This is the case, for example, in Pakistan where the Government decided to establish a corporate authority to administer the Monopolies Ordinance together with other business laws. 111/ This applies also to Colombia 112/ and Peru. 113/

2. Composition of the Authority, including its chairmanship and number of members, and the manner in which they are appointed, including the authority responsible for their appointment.

113. It is not possible to indicate which should be the appropriate authority. It is also not possible to lay down how the Authority should be integrated into the administrative or judicial machinery of a given country. This is a matter for each country to decide. The present Model Law has been formulated on the assumption that probably the most efficient type of administrative authority is one which is a quasi-autonomous body of the Government, with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., while at the same time providing for the possibility of recourse to a higher judicial body.

114. The number of members of the Authority differs from country to country. In some legislations the number is not fixed and may vary within a minimum and maximum number. Other countries state in their legislation the exact number of members, for example Argentina, Brazil, Bulgaria, Peru, Portugal, Republic of Korea and the Russian Federation. Other countries, such as Australia, have left to the appropriate authority the choice of the number of members. In many countries, the law leaves to the highest authority the appointment of the Chairman and the members of the Commission. In other countries, a high governmental official is designated to occupy the post by the law. In Argentina, the President of the Commission is an Under-Secretary of Commerce, and the members are appointed by the Minister of Economics. 114/ In some countries, such as India and Pakistan, it is obligatory to publish the appointments in the official gazettes for public knowledge. Certain legislations establish the internal structure and the functioning of the Authority and establish rules for its operation, while others leave such details to the Authority itself.

115. A tendency observed in some countries is the partial or total change regarding the origin of the members of the national authorities in relation to restrictive business practices. This is the case in Chile where under previous legislation members of the Resolutive Commission were basically officers from the public administration, while at present such posts include representatives from the University. 115/

3. **Qualifications of persons appointed.**

116. Several laws establish the qualifications that any person should have in order to become a member of the Authority. For example, in Peru members of the Multi-sectorial Free Competition Commission must have a professional degree and at least 10 years of experience in its respective field of knowledge. 116/

117. In a number of countries the legislation states that the persons in question should not have interests which would conflict with the functions to be performed. In India, for example, a person should not have any financial or other interest likely to affect prejudicially his functions. In Germany, members must not be owners, chairmen or members of the board of management or the supervisory board of any enterprise, cartel, trade industry association, or professional association. In Hungary, the President, vice presidents of the Office of Economic Competition and the senior officials and members of the Council on Competition may not pursue other activities for profit other than activities dedicated to scientific, educational, artistic, authorial and inventive pursuits, as well as activities arising out of legal relationships aimed at linguistic and editorial revision, and may not serve as senior officials of a business organization, or members of a supervisory board or board of directors. 117/ The Hungarian law also specifies that the members of the authority cannot have family links and cannot participate in an investigation of an entrepreneur with whom a close relative is in an employment or other legal relationship. 118/ Similar provisions are included in the Italian 119/ and Mexican legislation. 120/

4. **The tenure of office of the chairman and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.**

118. The tenure in office of the members of the Administering Authority vary from country to country. At present, members are appointed in Australia and Italy for 7 years, in Hungary for 6 years, in Brazil and Argentina for 4 years, in Canada and Mexico for 10 years, in Bulgaria, India, the United Kingdom and Pakistan for 5 years. In Lithuania, the law refers to a tenure of 3 years, and in others, such as Peru, it is for an indefinite period. In many countries, such as Thailand, the Republic of Korea, Argentina, India and Australia, members have the possibility of being reappointed.

5. **Removal of members of the Authority.**

119. Legislation in several countries provides an appropriate authority with powers to remove from office a member of the Administering Authority that has engaged in certain actions or has become unfit for the post. For example,

becoming physically incapable is a reason for removal in Thailand, the Republic of Korea and India; becoming bankrupt, in Thailand, India and Australia; in Mexico 121/ and Peru 122/ they can can only be removed if they are charged and sentenced for severe misdemeanour under criminal or labour legislation; abusing one's position and acquiring other interests, in India; failing in the obligations that one acquires as a member of the Administering Authority, in Argentina and Australia; being absent from duty, in Australia. Another cause for removal is being sentenced to imprisonment, for example, in Hungary 123/ and Thailand. 124/ In the People's Republic of China where a staff member of the State organ monitoring and investigating practices of unfair competition acts irregularly out of personal considerations and intentionally screens an operator from prosecution, fully knowing that he had contravened the provisions of China's law, constituting a crime, the said staff member shall be prosecuted for his criminal liability according to law. 125/ The procedure for removal varies from country to country.

6. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

120. In order to protect the members and officers of the Administering Authority from prosecution and claims, full immunity may be given to them when carrying out their functions. In Pakistan, for example, the Authority or any of its officials or servants have immunity against any suit, prosecution or other legal proceeding for anything done in good faith or intended to be done under the Monopolies Law.

7. The appointment of necessary staff.

121. There are variations for the appointment of staff of the Administering Authority. In some countries, as in Pakistan and Sri Lanka, the Administering Authority appoints its own staff. In others, the Government has this power.

COMMENTARY TO ARTICLE 8

FUNCTIONS AND POWERS OF THE ADMINISTERING AUTHORITY

I. <u>The functions and powers of the Administering Authority could include (illustrative)</u>:

122. Most legislations dealing with restrictive business practices establish a list of the functions and powers that the Authority possesses for carrying out its tasks, and which provide a general framework for its operations. An illustrative list of functions of the Authority is contained in Article 8.

(a) Making inquiries and investigations, including as a result of receipt of complaints;

123. The Authority may act on its own initiative, or following certain indications that the restrictive practice exists - for example, as a result of a complaint made by any person or enterprise. Information gathered by other government departments, such as the internal revenue, foreign trade, customs

or foreign exchange control authorities, if applicable, may also provide a necessary source of information. The Principles and Rules specify that States should institute or improve procedures for obtaining information from enterprises necessary for their effective control of restrictive business practices. The Authority should also be empowered to order persons or enterprises to provide information. In the event that this information is not supplied, the obtaining of a search warrant or a court order may be envisaged, where applicable, in order to require that information be furnished and/or to permit entry into premises where information is believed to be located.

124. In many countries, including Argentina, Australia, Germany, Norway, Pakistan, Peru and the Russian Federation, the Administering Authority has the power to order enterprises to supply information and to authorize a staff member to enter premises in search of relevant information. However, entry into premises may be subject to certain conditions. For example, in Argentina a court order is required for entry into private dwellings, while in Germany searches, while normally requiring a court order, can be conducted without one if there is a "danger in delay".

(b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;

125. The Administering Authority would need, as a result of enquiries and investigations undertaken, to take certain decisions as, for example, to initiate proceedings or call for the discontinuation of certain practices, or to deny or grant authorization of matters notified, or to impose sanctions, as the case may be.

(c) Undertaking studies, publishing reports and providing information to the public;

126. The Authority could undertake studies and obtain expert assistance for its own studies, or commission studies from outside. In Brazil, for example, the law establishes that the Administrative Council for Economic Protection (CADE) may approve the appointment of specialists and technical experts to assist in carrying out inquiries, surveys and studies. 126/ Some legislation explicitly requests the authorities to engage in particular studies. For example, in Thailand the Office on Price Fixing and Anti-Monopoly has the power and the duty to study, analyse and conduct research concerning goods, prices and business operations; 127/ in Argentina the Commission can prepare studies related to markets, including research into how their conduct affects the interests of consumers, and in Portugal the Council for Competition may request the Directorate-General for Competition and Prices to undertake appropriate studies in order to formulate opinions to be submitted to the Minister responsible for trade. 128/ The Authority could inform the public of its activities regularly. Periodic reports are useful for this purpose and most of the countries that have restrictive business practices legislation issue at least an annual report.

(d) Issuing forms and maintaining a register, or registers, for notifications;

127. The laws of most countries having notification procedures include provision for some system of registration which must be characterized by transparency. This is the case, for example, of Spain, with the Registry for Safeguarding Competition, 129/ and France at the level of the Directorate-General for Competition. 130/ Some countries maintain a public register in which certain, but not all, of the information provided through notification is recorded. The usefulness of a public register lies in the belief that publicity can operate to some extent as a deterrent to enterprises engaging in restrictive business practices, as well as provide an opportunity for persons affected by such practices to be informed of them. Such persons can also make specific complaints and advise of any inaccuracies in the information notified. However, not all the information notified can be registered, and one of the reasons for this is that certain information will relate to so-called "business secrets", and disclosure could affect the operations of the enterprise in question. Sensitive business information in the hands of the competition authorities cannot be overstated because a breach of such confidentiality will strongly discourage the business community from quick compliance with reasonable requests for information.

(e) Making and issuing regulations;

128. The Authority should also have powers to issue implementing regulations to assist it in accomplishing its tasks.

(f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;

129. Owing to the high level of specialization and the unique experience of the Administering Authority in the field of competition, a growing number of new laws or amendments give the Authority the additional responsibility for advising on the draft bills which may affect competition, as well as for studying and submitting to the Government the appropriate proposals for the amendment of legislation on competition. This is the case, for example, in Bulgaria at the level of the Commission for the Protection of Competition, 131/ Portugal with its Council for Competition, which can formulate opinions, give advice and provide guidance in competition policy matters, 132/ Spain, at the level of the Court for the Protection of Competition 133/ and Mexico at the level of the Federal Commission for Competition. 134/

(g) Promoting exchange of information with other States.

130. The Principles and Rules require States to establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices. It would be convenient to provide the Authority with the power to promote such exchange by clearly establishing it as one of its functions. For example, under the legislation of Belgium it is possible to communicate the necessary documents and information to the appropriate foreign authorities for competition matters,

under agreements regarding reciprocity in relation to mutual assistance concerning competitive practices. 135/ Information exchange and consultations are also provided for in bilateral agreements between the United States and Germany, Japan, Australia, and the Commission of the European Communities, as well as between France and Germany. In addition, it is provided for in Section F (4) of the Set.

II. Confidentiality:

1. According to information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.

2. Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.

3. Protecting the deliberations of government in regard to current or still uncompleted matters.

131. In accordance with paragraph 5 of section E of the Set of Principles and Rules, legitimate business secrets should be accorded the normally applicable safeguards, in particular to protect their confidentiality. The confidential information submitted to the Administering Authority or obtained by it can also be protected, in general, by the national legislation regarding secrecy. Nevertheless, in some countries such as in Mexico, 136/ Norway 137/ and Portugal, 138/ their legislation contains special provisions on the secrecy of the evidence obtained during the proceedings.

COMMENTARY TO ARTICLE 9

SANCTIONS AND RELIEF

I. The imposition of sanctions, as appropriate, for:

(i) Violations of the law;

(ii) Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;

(iii) Failure to supply information or documents required within the time-limits specified;

(iv) Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense;

132. Subparagraph II of Article 9 lists a number of possible sanctions for breaches enumerated in subparagraph I.

II. **Sanctions could include:**

(i) Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);

133. The power to impose fines on enterprises and individuals may be vested either in the Administering Authority, or in the judicial authority, or it may be divided between the two. In the latter case, for example, the Authority's power to impose fines might be limited to such conduct as refusals to supply information, the giving of false information and failure to modify agreements. In countries such as Brazil, Germany, Hungary, Japan, Lithuania, Mexico, Norway, Pakistan, Peru and the Russian Federation, and in the EC, the administering bodies have powers to impose fines. In Australia and the United States of America, the power to impose fines is vested in the courts. The maximum amount of fines varies of course from country to country.

134. Fines may also vary according to the type of infringement (in India and Portugal), or according to whether the infringement was committed wilfully or negligently (Germany and the EC), or they may be expressed in terms of a specific figure and/or in terms of the minimum or reference salary (Brazil, Mexico, Peru, Russian Federation), and/or they may be calculated in relation to the profits made as a result of the infringement (China, Germany, Hungary and Lithuania). Moreover, in certain countries, such as Germany, an offence can be punished by a fine of up to three times the additional receipt obtained as a result of the infringement. Treble damages are also important in cases of price-fixing in the United States. In Peru, in case of recurrence the fine could be doubled. 139/

135. It would seem logical that the fines be indexed to inflation, and that account be taken of both the gravity of the offences and the ability to pay by enterprises, so that the smaller enterprises would not be penalized in the same manner as large ones, for which fines having a low ceiling would constitute small disincentive for engaging in restrictive practices.

136. Recent enforcement attitudes towards arrangements have been to seek deterrence by means of very substantial fines for companies. In the EC, members of a plastics (PVC) cartel were fined more than 30 million ECUs under the regulation empowering the EC Commission to assess fines up to 10 per cent of the annual turnover of the offending enterprises. 140/ In the United States, legislation was enacted in 1990 raising the maximum corporate fine for an antitrust violation from US$ 1 million to US$ 10 million. 141/ In Japan, legislation has been introduced to allow fines up to 6 per cent of the total commerce affected over a three-year period. Under this legislation, a fine of US$ 80 million was imposed by the Japanese Fair Trade Commission on a cement cartel in 1991. 142/

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);

137. The power to impose imprisonment would normally be vested in the judicial authority. In certain countries, such as Brazil, Japan and Norway, the power

to impose terms of imprisonment is reserved for the judicial authorities on the application of the Administering Authority. Terms of imprisonment may be up to one, two, three or more years, depending upon the nature of the offence.

138. In countries such as Argentina and Canada, where the judicial authorities are responsible for decisions under the restrictive business practices legislation, the courts have the power to impose prison sentences of up to six years (Argentina) and up to two years (Canada). In the United States, criminal antitrust offences are limited to clearly defined "per se" unlawful conduct and defendant's conduct which is manifestly anticompetitive: price-fixing, dib-rigging, and market allocation. Only the Sherman Act provides criminal penalties (violations for Sections 1 and 2) and may be prosecuted as a felony punishable by a corporate fine and three years imprisonment for individuals. United States Antitrust Division prosecution of Sherman Act criminal penalties are governed by general federal criminal statutes and the Federal Rules of Criminal Procedure. 143/

(iii) Interim orders or injunctions;

139. In Hungary, in the event any illegal practice threatens imminent harm, the Supervisory Board may enjoin the person posing a threat from engaging in such practices, or may order him to take measures necessary to avoid such damage, and, if necessary, to establish safeguards. 144/

(iv) Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;

140. When the United States limited the import of colour television sets from the Republic of Korea, Samsung, Gold Star and Dae Woo cut prices locally to increase sales, but then agreed with each other to cease cutting prices. The Fair Trade Office ordered an end to the price fixing and required the companies to apologize in a local newspaper. 145/

141. Within this framework, and as an additional measure, the possibility may be considered of publishing cease and desist orders as well as the final sentence imposing whatever sanction the administrative or judicial authority have considered adequate, as is the case in France. 146/ This way the business community and specially consumers, would be in a position to know that a particular enterprise has undertaken an unlawful behaviour.

(v) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

142. This clause is applied in Mexico, where the Commission can order "partial or total deconcentration" of the merger. 147/

(vi) Restitution to injured consumers;

(vii) Treatment of the administrative or judicial finding of illegality as prima facie evidence of liability in all damage actions by injured persons.

COMMENTARY TO ARTICLE 10

APPEALS

1. Request for review by the Administering Authority of its decisions in light of changed circumstances.

2. Affording the possibility for any enterprise or individual to appeal within ... days to the (appropriate judicial authority) against the whole or any part of the decision of the Administering Authority, (or) on any substantive point of law.

143. Concerning the review of the administering authorities decisions, in many instances, the circumstances prevailing at the time of decision-making may change. It is recalled that the Administering Authority can, for example, periodically - or because of a change of circumstances - review authorizations granted and possibly extend, suspend or subject the extension to the fulfilment of conditions and obligations. Therefore, enterprises should be equally given the possibility of requesting review of decisions, when circumstances prompting the decisions have changed or have ceased to exist.

144. The right of a person to appeal against the decision of the Administrative Authority is specifically provided for in the law of most countries (for example Lithuania 148/ and the Russian Federation 149/) or, without specific mention, may exist automatically under the civil, criminal or administrative procedural codes (for example, Colombia 150/ and Portugal 151/). On the other hand, appeals are possible only in cases specifically mentioned in the competition law, as is the case, for example, with decisions of the Swedish Competition Authority. 152/

145. Appeals may involve a rehearing of the case or be limited, as in Brazil, India and Pakistan, to a point of law. Appeals may be made to administrative courts, as in Colombia and Venezuela, or to judicial courts, as in Italy, Lithuania and Spain, or to both, as it is in the Russian Federation, where an appeal may be lodged in an ordinary court or a court of arbitration. 153/ In this connection, a special administative court may be created, as for example, in Australia, 154/ Denmark, 155/ Kenya, 156/ Peru, 157/ and Spain. 158/ In India and Pakistan appeals go directly to the Supreme Court and the High Court respectively. This is also true for Peru, where appeals go directly to the Superior Court of the Lima Circuit. In Germany, in the case of mergers, appeals may go either through the judicial machinery of the country or directly to the Minister of Economic Affairs. In Austria appeals go to the Superior Cartel Court at the Supreme Court of Justice.

146. The European Community has created a specialized Court of First Instance to hear antitrust appeals, since such cases had begun to be a burden on the European Court of Justice because of the extensive factual records involved.

COMMENTARY TO ARTICLE 11

ACTIONS FOR DAMAGES

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

147. The proposed provision would give the right to an individual or to the State on behalf of an individual, or to an enterprise to bring a suit in respect of breaches of law, in order to recover damages suffered, including costs and interests accrued. Such civil action would normally be conducted through the appropriate judicial authorities, unless States specifically empower the Administering Authority in this regard. Provision for State parens patriae suit is found in a number of laws of developed countries. 159/ Such "class actions", in which users or consumers of a specific service or good who have suffered damage from anticompetitive behaviour, and whose individual claim would be too insignificant, have the right to institute action against enterprises. This is considered in the laws of Canada, France and the United States.

148. Brazil has authorized competitors or injured persons generally to sue for violations against the economic order, including price-fixing, predatory pricing and tying agreements. 160/ This is also the case under the laws of Hungary, 161/ Mexico, 162/ Peru, 163/ and Venezuela. 164/

Notes

1/ Report of the Intergovernmental Group of Experts on its twelfth session (TD/B/40(2)/2-TD/B/RBP/98), Annex I, Part C, Item 4 (c), paragraph 1.

2/ Cf. for example Colombia, Finland, India, the United Kingdom.

3/ Cf. Chile, Thailand.

4/ Cf. Canada, Denmark, Lithuania, Mexico, Norway, Sweden, the United Kingdom.

5/ Competition Act of 1986. Section 1.1.

6/ Competition Act of 1989. Section 1.

7/ Act 65 of 11 June 1993 relating to Competition in Commercial Activity. Section 1-1 (The purpose of the Act). This law is referred to as the Competition Act and entered into force on 1 January 1994.

8/ Legislative Decree No. 701 Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition. Article 2.

9/ Law of 22 March 1991 on Competition and Restriction of Monopolistic Activity in Commodity Markets. Article 1.

10/ Competition Act (1993:20) of 14 January 1993. Section 1.

11/ Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S.CT. 514, 517, 2 L. Ed.2d 545, 549 (1958).

12/ Law to Promote and Protect the Exercise of Free Competition. Article 1.

13/ Decision 285 of the Commission of the Cartagena Agreement. Article 1.

14/ Trade Practices Act, 1974. As amended. Section 45.

15/ Article 10 of the Federal Law on Economic Competition.

16/ See: TD/B/RBP/15/Rev.1, paras. 24 to 26.

17/ It should be noted that a competition authority, particularly if it is an independent administrative body, will not have the political mandate to determine how certain restrictions would affect the "national interest", or influence a country's "overall economic development". Because of this, authorizations should be based, in principle, on competition concerns. As an alternative, Governments might consider the possibility that their national authorities could assist the Government in the preparation, amending or reviewing of legislation that might affect competition, such as mentioned in Article 8 (1) (f) of the Model Law, and give its advisory opinion on any proposed measure that might have an impact on competition.

18/ As is the case in Finland where the legislation states that "a restrictive practice shall be deemed to have detrimental effects if it, in a manner deemed unacceptable from the point of view of sound and effective economic competition ...". Act on Restrictive Business Practices (709/1988). Section 7. Lithuania which legislation prohibits "activities of economic entities having a dominant position in the market which restrict or may restrict competition by infringing economic interests". Law on Competition, 1992. Article 3 (1). Peru: which legislation prohibits "those acts and behaviours ... generating harm to the general economic interest". Legislative Decree No. 701 Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition of 1992. Article 3.

19/ United States Department of Justice/Federal Trade Commission Horizontal Merger Guidelines, 2 April 1992.

20/ Standard Oil Co. of California and Standard Stations Inc. v. United States. United States Supreme Court, 1949. 337 U.S. 293, 299 S.Ct 1051, 93 L.Ed. 1371.

21/ Generale Sucrière etc. v. Commission of European Communities, European Court of Justice, ruling of 15 December 1975, OJC 43, 25 February 1976.

22/ Peruvian legislation allows the administering authority to investigate and ban those acts by which government officials interfere with free competition. In a recent case, the Minister for Economics and Finance was summoned to inform about an agreement between the Ministry and various transport associations by which urban transportation tariffs were settled at uniform level. The Multi-sectorial Free Competition Commission considered the agreement as anti-competitive and decided that, in future, the Minister should refrain from promoting similar agreements. (Information submitted by the Peruvian Government).

23/ Under the Restrictive Practices Act and its system of enforcement by court orders, the United Kingdom law is particularly strong. If an employee or a manager aids or abets his enterprise in breach of a court order, he can be made personally liable for aiding and abetting a contempt of court. This can provide a strong deterrent, although it is only likely to be publicly acceptable for individuals to be subject to fines or other penalties if there are strong procedural protections and if the law which they are being required to respect is clear. (Information provided by the Government of the United Kingdom).

24/ The United Kingdom competition law clearly applies to the commercial activities of local governments, which in this respect has no particular status (although many of its activities do not amount to "the supply of goods or services" or are not "in the course of business", thereby taking them out of the scope of United Kingdom competition law). The Crown is immune from action under United Kingdom competition law, but it is notable that not all State activities are Crown activities (for example, the National Health Service). It is also Government policy for the Crown to behave as if it were subject to the provisions of competition law in its commercial activities.

25/ Centrafarm B.V. v. Sterling Drug, 1974 ECR 1147 (EC); Copperweld Corp. v. Independence Tube Corp., 104 S.CT 2731 (1984).

26/ Expanding the rule of Copperweld. Satellite Fin. Planning Corp. v. First National Bank, 633 F. Sup. 386 (D. Del. 1986), but see Sonitrol of Fresno v. AT&T, 1986-1 Trade Cas (CCII) Section 67,080 (32.6 per cent ownership does not establish lack of rivalry).

27/ See: United States Justice Department's 1988 Antitrust Enforcement Guidelines for International Operations. At 62-63.

28/ Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970, as amended up to 1983. Section 2 (1) (a).

29/ The Monopolies and Restrictive Trade Practices Act of 1969, as amended up to Act 58 of 1991. Section 2 (a).

30/ Maintenance and Promotion of Competition Act, 1979. Section 1 (x) (a).

31/ Law of 24 February 1990 on Counteracting Monopolistic Practices. Article 2 (3) (b).

32/ Law of 22 March 1991 on Competition and Restriction of Monopolistic Activity in Commodity Markets. Article 6 (I).

33/ Law for the Protection of Competition of 1989, in particular Article One, referred to "prohibited conducts".

34/ Legislative Decree No. 701 Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition of 1992. Article 6.

35/ Law to Promote and Protect the Exercise of Free Competition of 1991. Article 5.

36/ Decision 285 of the Commission of the Cartagena Agreement. Norms to Prevent or Correct Distortions in Free Competition Generated by Restrictive Competitive Practices. Article 3.

37/ Decree 2153 from 30 December 1992 on Functions of the Superintendency of Industry and Commerce. Article 47.

38/ Decision 285 of the Commission of the Cartagena Agreement. Article 4 (f).

39/ Monopolies and Restrictive Trade Practices Act, 1969, as amended up to 1991. Section 32.

40/ Northern Pacific Railway Co. v. United States, 356 US 1 (1958).

41/ Law of 22 March 1991 on Competition and Restriction of Monopolistic Activity in Commodity Markets. Articles 6 (1) and 8.

42/ Information submitted by the Government of India.

43/ In addition to the United States, a number of countries in recent amendments to their legislation have made price fixing and collusive tendering a *per se* prohibition.

44/ Weeb-Pomerene Export Trade Act of 1918 and the 1982 Export Trading Company Act. It is to point out that United States Antitrust Law (through the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C § 6a) applies to anticompetitive effects on United States export markets, and not merely on

United States domestic markets. Also, joint ventures formed under the U.S. Export Trading Company act cannot be described as "export cartels", because they do not possess market power in domestic or foreign markets; rather, they are export-oriented joint ventures whose activities are circumscribed to ensure that they have no anticompetitive effects on United States markets. (Information provided by the United States Government.)

45/ See "Collusive tendering" - study by the UNCTAD secretariat (TD/B/RBP/12).

46/ Restrictive Trade Practices, Monopolies and Price Control Act, No. 14 of 1988. Section 11 (4).

47/ Information provided by the Swedish Government.

48/ The Monopolies and Restrictive Trade Practices Act, section 33, subsection 1, para. (9).

49/ Ibid., para. (1).

50/ In re Insurance Antitrust Litigation, DKT 89-16530, reported in 60 BNA ATRR 909, 27 June 1991.

51/ The Associated Press (AP) v. United States exemplifies this point. 326 US, 165S Ct. 1416, 86L. Ed. 2013, re-hearing denied 326 (802) 1945. For further details see: TD/B/RBP/15/Rev.1, para. 54.

52/ Wilk v. American Medical Association, 1987, 2CCH Trade Cas. Section 67,721 (N.D. Ill. 1987).

53/ Silver v. New York Exchange. 373 US 357 (1963). For further details see: idem, para. 55.

54/ Pacific Northwest Wholesale Stationers v. Stationery & Printing Co., 472 US: 284 (1985).

55/ An alternative for using the expression "will produce net public benefit" in the last part of the proposed article, might be using "do not produce public harm". This way it will be possible to avoid unjustified burden of proof on firms and the result in procompetitive practices (Comment submitted by the United States Government).

56/ Spanish legislation on this matter was developed by special regulations. Royal Decree 157/1992 of 21 February 1992, developing Law 16/1989 of 17 July 1992.

57/ Decree 2153 of 30 December 1992, on the Superintendency of Industry and Commerce. Article 49.

58/ Monopolies and Restrictive Trade Practices Act. Section 32.

59/ Law on Competition, 1992. Article 5.

60/ Law of 22 March 1991 on Competition and Restriction of Monopolistic Activity in Commodity Markets. Article 6 (3).

61/ Legislative Decree No. 701 Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition, 1992. Article 7.

62/ Comment provided by the United States Government.

63/ Fair Trading Act, 1973. Section 6 (1). Id. Section 6 (2).

64/ Ibid.

65/ Law of 24 February 1990 on Counteracting Monopolistic Practices. Article 2 (7).

66/ Competition Protection Act of the Czech Republic, 1991. Article 9.

67/ Act LXXXVI of 20 November 1990 on the Prohibition of Unfair Market Practices. Para. 21 (1) (c). It is interesting to mention that Hungarian Law instead of using the term "abuse of dominant position", uses "abuse of economic superiority".

68/ Decree-Law No. 371/93 of 29 October 1993 on the Protection and Promotion of Competition. Article 3 (3) (a).

69/ Law on Competition, 1992. Article 2: Definition of "Dominant position".

70/ Law of 22 March 1991 on Competition and Restriction of Monopolistic Activity in Commodity Markets. Article 4.

71/ Act Against Restraints of Competition, 1957, as amended. Section 22 (3).

72/ CJE 14.2.1978. United Brands Company and United Brands Continentaal BV v. Commission, 27/76, 1978, ECR 207.

73/ For additional information on United States Law (Supreme Court Decisions) on non-price vertical restraints in distribution, see: White Motor Co. v. United States, 372 U.S. 253, 83 S.CT. 696, 9 L.Ed.2d 738 (1963) (Applies the rule of reason); United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S.CT. 1856, 18 L.Ed.2d 1249 (1967) (applies the "per se" approach), and particularly; Continental T.V. Inc., v. GTE Sylvania Inc., 433 U.S. 36, 97 S.CT 2549, 53 L.Ed.2d 568 (1977) (rejects the "per se" approach of Schwinn and returns to the rule of reason).

74/ See Hoffman-La Roche case.

75/ Law of 2 September 1993 of the People's Republic of China for Countering Unfair Competition. Article 11. This law also lists a number of cases not considered unfair such as, selling fresh goods, seasonal lowering of prices, changing the line of production or closing the business.

76/ McDonald v. Johnson and Johnson, No. 4-79-189 (D. Minn, 14 April 1982).

77/ Hugin-Liptons case. Commission Decision of 8 December 1977 (Official Journal of the European Communities, L.22 of 17 January 1978). Also, Instituto Chemioterapico Italiano S.P.S. - Commercial Solvents: Judgement of 6 March 1974.

78/ See: Effem and Atlas Building Products Company v. Diamond Block & Gravel Company cases.

79/ FTC v. Morton Salt Co., 334 U.S. 37, 1948.

80/ RRTA v. Carona Sahu Company Ltd., RTPE No. 2, 1974, MRTPC order of 21.3.75, Grindwell Norton, RTPE No. 29, 1974, MRTPC order of 21.11.75.

81/ Legislative Decree No. 701 Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition, 1992. Article 5 (b). (Information provided by the Peruvian Government.)

82/ Trade Practices Act, 1974, Section 49, subsection 1.

83/ Commentary provided by the United States Government.

84/ Commerce Act 1986. Part Two, Section 37 (1).

85/ Information provided by the Swedish Government.

86/ Reference is made to the Consumer Protection Act 1987; where it is an offence to give a "misleading price indication". When considering whether or not a particular price indication is misleading, the parties can refer to a statutory Code of Conduct approved by the Secretary of State in 1988. Paragraph 1.6.3 (c) advises traders not to use a recommended price in a comparison unless "the price is not significantly higher than prices at which the product is genuinely sold at the time you first made the comparison. In other words, a dealer who says "Recommended Retail Price XXX Pounds, my Price is half less", may be regarded as giving a misleading price indication and thus committing a criminal offence under the Consumer Protection Act if that recommended retail price is significantly higher than the prices at which the goods are usually sold by other dealers.

87/ The Competition Act, 1986, Section 37.3 (4).

88/ Official Journal of the European Communities, No. L.377/16 of 31 December 1980.

89/ The Competition Act, 1986. Section 37.3 (6).

90/ Comment provided by the United States Government.

91/ FTC Decision of 18 April 1978. Information transmitted by the Government of Japan.

92/ Cinzano and Cie. GmbH v. Jara Kaffee Gesch ppe GmbH and Co. Decision of 2 February 1973.

93/ Tepea B.V. v. E.C. Commission, Case 28/77; Commission decision of 21 December 1976. The Commission's decision was upheld by the European Court of Justice in its ruling of 24 June 1978.

94/ Judgement given on 10 October 1978, Case 3/78: (1978) ECR 1823.

95/ Comment provided by the United States Government.

96/ Concerning unilateral refusals to deal see: United States v. Colgate & Co., Supreme Court of the United States, 1919. 250 US. 300, 39 S.CT. 465, 53 1.Ed. 992, 7 A.L.R. 443. Also: United States v. Schrader's Son Inc., 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920).

97/ Comment provided by the United States Government.

98/ The United States Supreme Court had defined tying arrangements as: "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier". Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.ed 545 (1958). Also it has stated that: "the usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. Because such an arrangement is inherently anticompetitive, we (the Supreme Court) have held that its use by an established company is likely 'substantially to lessen competition' although a relatively small amount of commerce is affected." Brown Shoe Co. v. United States, 370 U.S. 294, 330, 82 S.Ct. 1502, 1926, 8 L.Ed. 2d 510 (1962).

99/ For a discussion of tied purchasing in its various forms and the legal situation in various countries, see: UNCTAD, "Tied purchasing", (TD/B/RBP/18).

100/ H.R. 4972, amending Section 271 (d) of the Patent Act.

101/ It should be noted that merger control is presented here as in the Set, under the concept of "abuse of a dominant position". Another alternative would be to have a separate Article on merger control that would focus more precisely on the concern that mergers should not be permitted to create or enhance market power or to facilitate its exercise. The alternative text on Merger Control could read as follows:

POSSIBLE ELEMENTS FOR A SEPARATE ARTICLE ON MERGER CONTROL

I. Notification by acquiring party or merging parties

(a) An acquiring party or merging party obtaining a substantial share of a significant enterprise doing business within the jurisdiction could be compelled, or provided with incentives, to notify such acquisition or merger to the Administering Authority.

(b) Size of transaction standards, such as price paid and percentage of ownership obtained, could be used to avoid reviewing competitively unimportant transactions.

(c) Notification rules might require description of the products, services, markets and revenues of the enterprises involved, and submission of basic documents relating to the transaction.

II. Substantive standards

(a) Acquisitions of mergers could be subject to being prevented or undone whenever they are likely to lessen competition substantially in a line of commerce in the jurisdiction or in a significant market within the jurisdiction.

(b) Acquisitions or mergers might be acceptable where the parties prove that the acquiring party is the least anti-competitive purchaser for a hopelessly failing enterprise.

III. Preliminary remedy, investigation and permanent remedies

(a) It could be provided that the authority can halt a merger or acquisition for a short time (i.e. 30 days) while it decides whether to conduct a full investigation, and for a somewhat longer time (i.e. 90 days) until it receives all information relevant to evaluating the probable anti-competitive effects of the transaction.

(b) The authority could be empowered to demand documents and testimony from the parties and from enterprises in the affected lines of commerce, with the parties losing additional time if their response is late.

(c) If the transaction is considered anti-competitive in terms of the legal standard, and if a full hearing before a tribunal results in a finding against the transaction, a permanent order against the transaction could be ordered, or if it has already been completed, divestiture of sufficient assets to remedy the competitive problem might be ordered.

102/ Council Regulation (EEC) No. 4064/89 of December 1989 on the control of concentrations between undertakings. OJ L 395, 30.12.1989.

103/ For a detailed analysis of the concentration of market power through mergers, takeovers, joint ventures and other acquisitions of control, and its effects on international markets, in particular the markets of developing countries, see TD/B/RBP/80/Rev.1.

104/ For example, the Korean Fair Trade Office held illegal an acquisition combining a company with 54 per cent of the PVC stabilizer market and another company with 19 per cent of the same market. The acquiring company was ordered to dispose of the stock. In re Dong Yang Chemical Industrial Co., 1 KFTC 153. 13 January 1982.

105/ Under the United States experience, conglomerate mergers are highly unlikely to pose competitive problems (comment submitted by the United States Government).

106/ For a full account of these cases, see TD/B/RBP/48, paras. 12-22.

107/ The situation has to be considered not only at the level of directors. In the United States it is illegal not only for a company to have one of its directors serve also as a director of a competitor, but also for it to have one of its corporate officers serve as a director of a competitor.

108/ General Assembly resolution 39/248 of 9 April 1985.

109/ Id. Section 15.

110/ Information provided by the Swedish Government.

111/ The Monopolies and Restrictive Trade Practices Ordinance (amended), June 1980.

112/ Decree 2153 of 30 December 1992, on the Superintendency of Industry and Commerce. Article 3. The Superintendency is also responsible for the administration of the following legislation: patents, trademarks, consumer protection, chambers of commerce, technical standards and metrology.

113/ Decree Law No. 25868. Law creating the National Institute for the Safeguard of Competition and the Protection of Intellectual Property (INDECOPI). Article 2. INDECOPI is also responsible for the administration of the following legislation: dumping and subsidies, consumer protection, advertising, unfair competition, metrology, quality control and non-custom barriers, bankruptcy procedures, trademarks, patents, plant varieties, appellations of origin and transfer of technology.

114/ Law 22.262 for the Safeguarding of Competition. Article 7.

115/ Decree 511 from 27 October 1980. Reference to Legislative Decree 2.760. Article 16.

116/ Legislative Decree No. 701 Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition, 1992. Article 10.

117/ Act LXXXVI of 20 November 1990 on the Prohibition of Unfair Market Practices. Para. 56 (1).

118/ Id. Para. 56 (2).

119/ Rules for the Protection of Competition and the Market. Article 10 (3).

120/ Federal Law on Economic Competition, 1992. Article 26 (ii), second paragraph. This provision was developed by the Internal Rules of the Federal Competition Commission from 12 October 1993. Article 33.

121/ Federal Law on Economic Competition, 1992. Article 27.

122/ Information provided by the Peruvian Government.

123/ Act LXXXVI of 20 November 1990 on the Prohibition of Unfair Market Practices. Para. 54 (2) (a).

124/ Price Fixing and Anti-Monopoly Act, B.E. 2522 (1979). Section 12 (6).

125/ Law of 2 September 1993 of the People's Republic of China for Countering Unfair Competition. Article 32.

126/ Decree 52025 of 20 May 1963. Regulations giving effect to Law 4167 of 10 September 1962 concerning the Suppression of Abuse of Economic Power. Article 15 (ix). Complemented by Law 8158 of January 1991 instituting Provisions for the Protection of Competition and Other Measures.

127/ Ibid., Section 16 (2).

128/ Decree-Law No. 371/93 of 29 October 1993 on the Protection and Promotion of Competition. Articles 13 (1) (c) and 13 (2).

129/ Royal Decree 157/192 of 21 February 1992. Chapter III, Articles 19 to 23.

130/ Ordinance 86-1243 of 1 December 1986 on the Liberalization of Prices and Competition. Article 44.

131/ Statute of 15 November 1991 on the Organization and Activities of the Commission for the Protection of Competition. Article 4 (3).

132/ Decree-Law No. 371/93 of 29 October 1993 on Protection and Promotion of Competition. Article 13 (1) (b), (c) and (d).

133/ Law 16/1989 of 17 July for the Protection of Competition. Article 26. Additional information on this matter can be found at: Tribunal de Defensa de la Competencia. Memoria 1992, p. 66.

134/ Federal Law on Economic Competition, 1992. Article 24 (V) and (VI).

135/ Law on the Safeguarding of Economic Competition. Article 50 (b).

136/ Federal Law on Economic Competition, 1992. Article 31, para. 2; and Internal Rules of the Federal Commission for Competition of 12 October 1993. Article 34.

137/ Act 65 of 11 June 1993 relating to Competition in Commercial Activity. Section 6-2 (Securing of Evidence).

138/ Decree-Law No. 371/93 of 29 October 1993 on Protection and Promotion of Competition. Article 19.

139/ Legislative Decree No. 701 Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition, 1992. Article 23. (Information provided by the Peruvian Government).

140/ Hoechst AV v. Commission, Case 46/87R 1987 E. Comm. J. Rep. 1549 (1988).

141/ H.R. 29, Antitrust Amendment Act of 1990.

142/ 60 BNA ATRR 459.

143/ Information provided by the United States Government.

144/ Act LXXXVI of 20 November 1990 on the Prohibition of Unfair Market Practices. Paragraphs 38(2) and 43(1)(c).

145/ In re Samsung Electronics Company, 4 KFTC 58. 26 December 1984.

146/ Ordinance 86-1243 of 1 December 1986 on Liberalization of Prices and Competition. Articles 12 and 15.

147/ Federal Law on Economic Competition, 1992. Article 35 (I).

148/ Law on Competition, 1992. Article 14 concerning appeals against decisions of the Institution of Price and Competition. It is to point out that the law establishes that appeals to court shall not suspend compliance with directions and decisions, unless the court stipulates otherwise.

149/ Law of 22 March 1991 on Competition and Restriction of Monopolistic Activity in Commodity Markets. Article 29, on procedure for appealing against decisions of the Anti-Monopoly Committee.

150/ Decree 2153 of 30 December 1992, on the Superintendency of Industry and Commerce. Article 52, fifth paragraph.

151/ Decree-Law No.371/93 of 29 October 1993 on Protection and Promotion of Competition. Articles 28 and 35.

152/ Section 62 of the Competition Act, 1993. Only those cases mentioned in Sections 60 and 61 of the Act may decisions taken by the Swedish Competition Authority be appealed to the Stockholm City Court.

153/ Information provided by the Russian Government.

154/ Trade Practices Tribunal.

155/ Appeal Tribunal appointed by the Minister of Commerce.

156/ Restrictive Trade Practices Tribunal.

157/ Tribunal for the Defence of Competition and Intellectual Property.

158/ Court for the Protection of Competition.

159/ See the Hart-Scott-Rodino Anti-Trust Improvement Act of 1976, with respect to the United States.

160/ Law 8158 of 10 January 1991.

161/ Act LXXXVI of 20 November 1990 on the Prohibition of Unfair Market Practices. Paragraph 29(1)(e).

162/ Federal Law on Economic Competition, 1992. Article 38.

163/ Legislative Decree Against Monopolistic, Controlist and Restrictive Practices Affecting Free Competition. Article 25.

164/ Law to Promote and Protect the Exercise of Free Competition. Article 55.